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In The

Supreme Court of The United States

October Term 1996

JAMES L. DODARO, HOWARD YERUSALIM, FRANK A. URSOMARSO, JAMES F. MALONE, III, JOHN L. SOKOL, JR., S. MICHAEL PALERMO, JOSEPH L. DIRIENZO, SAMUEL S. CARNABUCI, MELVIN M. SHELTON, DEBORAH KOVAL, GEORGE PILECKI AND SEAN PILECKI,

Petitioners

vs.

CHARLES CHRISTY ,

Respondent

On Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI OF PETITIONERS JAMES L. DODARO, HOWARD YERUSALIM, FRANK A. URSOMARSO, JAMES F. MALONE, III, JOHN L. SOKOL, JR., S. MICHAEL PALERMO, JOSEPH L. DIRIENZO, SAMUEL S. CARNABUCI, MELVIN M. SHELTON, DEBORAH KOVAL, GEORGE PILECKI AND SEAN PILECKI

Michael M. Baylson
Counsel of Record
Frank E. Noyes, II

DUANE, MORRIS & HECKSCHER
One Liberty Place, 40th Floor
Philadelphia, PA 19103
(215)979-1150/1138

65 pp

QUESTIONS PRESENTED

1. Whether Petitioners are entitled under *Behrens v. Pelletier*, 116 S. Ct. 839 (1996), and *Johnson v. Jones*, 115 S. Ct. 2151 (1995), to immediate appellate review of the denial of their qualified immunity claims asserting that although the relevant law was clearly established, their actions were objectively reasonable, where the District Court stated that there were issues of fact but did not identify them.

2. Whether, in a qualified immunity appeal, the presense of a factual issue is sufficient to negate the defendents' right to immediate appellate review of their claim that their actions satisfied the second prong of qualified immunity, objective legal reasonableness, contrary to this Court's decision in *Behrens v. Pelletier*, and the decisions of most other circuits.

LIST OF ALL PARTIES

The Petitioners are James L. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L. DiRienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Koval, George Pilecki and Sean Pilecki, all defendants below.

Additional defendants who are not participating in this appeal include the Pennsylvania Turnpike Commission, an agency of the Commonwealth of Pennsylvania, Robert Brady, John Boschi, John Stewart, and Vincent Greco.

The respondant is Charles Christy, plaintiff below.

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PETITION FOR WRIT OF CERTIORARI of Petitioners James L. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L. DiRienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Koval, George Pilecki and Sean Pilecki

Petitioners respectfully request that a Writ of Certiorari issue to review the judgment entered by the Court of Appeals for the Third Circuit in this case on June 19, 1996.

OPINIONS BELOW

The opinion of the District Court below is reported at *Christy v. Pennsylvania Turnpike Commission*, 904 F. Supp. 427 (E.D.Pa. 1995), and is reproduced *infra* at App. 1a. The Judgment Order (without opinion) of the Third Circuit Court of Appeals is unreported, but is available at 1996 U.S. App. LEXIS 17939 (3d Cir. June 19, 1996) and is reproduced *infra* at App. 1b. The Order denying appellants' Petition for Rehearing dated July 19, 1996 is reproduced infra at App. 1c.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was initially entered on June 19, 1996. The Court of Appeals denied the Petitioners' timely petition for rehearing on July 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE CASE

Factual Background

Plaintiff Charles Christy claims that in 1993 he was denied two promotions at the Pennsylvania Turnpike Commission (the "Commission") because of political discrimination. The positions were: Eastern Region Paint Crew Foreman and Regional Fleet Equipment Manager - East. Petitioners are current or former Commissioners or Commission employees whom Christy alleges were involved in some way

in the promotion process for one or both of the promotion vacancies which Christy challenges.

Petitioners James Dodaro, Howard Yerusalim, Frank Ursomarso, and James Malone were Commissioners at the time of the two promotions. Dodaro and Yerusalim voted to approve the candidates recommended by the Personnel Committee for the two promotions.[1] Ursomarso did not vote because was not present at either of the two meetings at which the votes were taken, and Malone did not vote on the second promotion because he was not present for the vote to approve the second promotion.

Petitioners John Sokol, Michael Palermo, Joseph DiRienzo, Samuel Carnabuci, Deborah Koval (now Everly) and Melvin Shelton were members of the Personnel Committee at the time of the disputed promotions. The Personnel Committee reviewed the interview results for the top three ranked candidates for each of the two promotions, and in each case made a single recommendation to the Commissioners.

Christy also sued Sean Pilecki and George Pilecki, who were not part of the promotion process. Sean Pilecki is a Commission employee who was a member of the Paint Crew, and was the successful candidate for the Paint Crew Foreman position. George Pilecki is Sean Pilecki's father, and a retired Commission employee who worked as a clerk.

Commission Procedures for Promotion - Policy Letter 65

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1 Sean Pilecki, who is a defendant and a petitioner herein, was promoted to Paint Crew Foreman. Commission employee Frank Dunn, who was not sued by Christy, was promoted to the Regional Fleet Equipment Manager position.

The promotions at issue were governed by the Commission's Policy Letter 65, which set forth detailed merit-selection procedures for filling vacancies in supervisory positions, including a three-step merit system to process applications for promotions. Policy Letter 65 was adopted in part to comply with this Court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

The policy directs that job openings be posted, so that any current employee may apply. Those applications which meet minimum requirements (length of service, education, etc.), are accepted by the Human Resources office, and are sent to the appropriate department head, who appoints a three person "Interview Committee" to interview all applicants who meet the minimum standards. The candidates are rated numerically using the written job criteria and the interview results. The names of the three to six highest scoring candidates are forwarded to the Personnel Committee, together with a written explanation why the particular candidates were recommended.

The Personnel Committee then reviews the Interview Committee's recommendations and chooses one of the top ranking candidates to send to the Commission. The Commissioners have uniformly followed the recommendation of the Personnel Committee; under Policy Letter 65 they may only accept, reject or defer the recommendation; they may not select another candidate. The Commissioners generally vote to approve Personnel Committee recommendations (at least for the lower-level supervisory promotions such are at issue in this case) on a voice vote at formal Commission meetings.

The Promotions at Issue

Plaintiff was one of three individuals recommended by the Interview Committee to the Personnel Committee for the

position of Paint Crew Foreman. While Plaintiff gratuitously identified his political affiliation on his resume, the record of this case contains no facts whatsoever concerning the political affiliation of the successful candidate, Petitioner Sean Pilecki. After reviewing all of the material, the Personnel Committee recommended Petitioner Sean Pilecki to the Commission as the most qualified candidate, and he received the promotion.

Plaintiff then applied for the position of Regional Fleet Equipment Manager - East. However, plaintiff was not among the three individuals recommended by the Interview Committee to the Personnel Committee; therefore, the members of the Personnel Committee as well as the Commissioners, had no knowledge that plaintiff had even applied for this job. Another Commission employee, Frank Dunn, who was recommended to the Personnel Committee, and subsequently the Commissioners, received the promotion.

In support of his allegations of political discrimination, plaintiff Christy relied on two facts. First, he relies on his own version of a conversation which he had with John Boschi (not a petitioner, but a defendant in the District Court), who was in charge of maintenance for the Commission and had been a member of the Interview Committee for the Paint Crew position. Under plaintiff's version of this conversation, Boschi told plaintiff that he did not get the Paint Crew promotion because plaintiff failed to get the support of Commissioner Brady (also a defendant in the District Court, but not a petitioner). Boschi allegedly advised Christy that politics was important in getting promotions on the Turnpike. There is no evidence that any other petitioner had knowledge of the Boschi conversation, or that there is any legal principle under which a petitioner could be bound or was influenced by that conversation.

Secondly, plaintiff presented an affidavit of Louis Sperduti (contradicting Sperduti's own sworn deposition taken at the outset of the case), that Petitioner Sean Pilecki and his father, Petitioner George Pilecki, had admitted that they "were willing to use" unspecified political influence in getting a promotion for Sean Pilecki. Frank Dunn, who received the Regional Fleet Equipment Manager promotion, allegedly made a similar statement to Sperduti.

Summary Judgment Motions

Christy filed suit pursuant to 42 U.S.C. § 1983 alleging that the defendants made adverse employment decisions against him based on his political affiliation, in violation of his First Amendment rights. Jurisdiction before the District Court arose pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331 (general federal question jurisdiction).

Each petitioner separately filed a summary judgment motion in January 1995, after some discovery had occurred, but well before discovery was complete. Plaintiff did not respond to the motion, but was permitted to complete discovery. Following discovery, summary judgment motions were also filed on the merits of the case as well. Petitioners' qualified immunity claims were based on each defendant showing, based on the uncontradicted facts, that he or she reasonably could have believed his or her conduct was consistent with the clearly established law, *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

Under the Qualified Immunity doctrine, there are two separate inquiries. The first is whether the legal principles governing the defendants' actions were clearly established at the time of those actions. If the relevant law was clearly established (as petitioners concede), the second inquiry must be

posed, whether a reasonable official in the circumstances of each defendant would believe that his or her conduct was consistent with the clearly established law. This issue is addressed under a test of "objective reasonableness." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Qualified immunity protects an official, even when the relevant law is clearly established, where a reasonable official in the same circumstances could conclude that his actions were consistent with clearly established law.

Petitioners' qualified immunity claims were and are based on the second of the two inquiries -- that reasonable officials under the same circumstances would believe that their actions under Policy Letter 65 were consistent with clearly established law.

The Decisions Below

The District Court denied summary judgment on the merits and on qualified immunity for all the defendants in one opinion, entered November 8, 1995, *Christy v. Pennsylvania Turnpike Commission*, 904 F. Supp. 427 (E.D.Pa. 1995). After correctly citing the legal test for qualified immunity, the District Court denied summary judgment as follows:

> Joint Defendants argue that summary judgment is appropriate because they followed the procedures established in Policy Letter 65. They argue that since they could reasonably have believed that Policy Letter 65's procedures defined the legal way to promote and because they did follow Policy Letter 65's procedure, they could reasonably have believed that they acted lawfully and are entitled to qualified immunity.

> If Christy alleged procedural violations, this argument would succeed. Christy's lawsuit, however, ***alleges*** that although Joint Defendants may have comported with the administrative procedures in that they had the appropriate meetings and took the appropriate votes, in fact, these procedures were a smokescreen for the actual political patronage promotion process. For this reason, Joint Defendants' reliance on process does not answer whether they reasonably believed they acted legally. . . .
>
> * * *
>
> [W]e conclude that summary judgment is . . . inappropriate on the issue of qualified immunity. If Christy's ***allegations*** are true, then Joint Defendants knowingly used the procedures in Policy Letter 65 to effectuate political patronage, which was clearly proscribed at the time. *Rutan*, 497 U.S. 62. No public official could reasonably have believed that such knowing circumvention was legal, and for this reason we deny summary judgment.

904 F. Supp. at 434, App. 15a-16a (emphasis added). The District Court thus relied on *allegations* rather than facts of record to deny qualified immunity.[2] After thus rejecting the qualified immunity claims of twelve defendants, the District

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2 In a subsequent opinion denying interlocutory appeal on the merits, the Court attempted to correct this error by classifying it as a mere misstatement; however, no opinion identifies what evidence supports Christy's allegations.

Court subsequently granted summary judgment for one of the same defendants on reconsideration, not merely on qualified immunity, but on the merits of plaintiff's claim:

> We find that this evidence does not, in fact, indicate that Ursomarso had actual knowledge of political discrimination and that he abstained from voting on personnel matters to allow the discrimination to continue and that this abstention fostered an atmosphere that tolerated, condoned or encouraged political discrimination.

Christy v. Pennsylvania Turnpike Commission, 912 F. Supp. 146, 147 (E.D.Pa. 1996). Thus, the same "evidence" was interpreted differently by the same District Court in two opinions, with diametrically opposite results.

On June 19, 1996 a panel of Third Circuit Court of Appeals granted plaintiff's motion to dismiss the pre-trial appeal of twelve individual defendants from the denial of qualified immunity, in a two-sentence *per curiam* Order without opinion, on the basis that the appeal involved factual issues that precluded interlocutory appeal under *Johnson v. Jones*, 115 S. Ct. 2171 (1995), even though the District Court had not cited *Johnson* and had not identified any factual issues preventing qualified immunity. See 1996 U.S. App. LEXIS 17939 (3d Cir. June 19, 1996), App. 1b.

REASONS TO GRANT A WRIT OF CERTIORARI

A. Summary

As a result of the Third Circuit's refusal to hear the qualified immunity appeal of the 12 individual petitioners (most of whom never knew plaintiff or anything about his political

beliefs), trial is scheduled to start in the Eastern District of Pennsylvania without these individuals having any appellate review of the District Court's denial of qualified immunity. The *Johnson v. Jones* decision upon which the Third Circuit relied was narrowly construed by this Court in *Behrens v. Pelletier*, 116 S.Ct. 834 (1996), so to allow immediate appellate review of qualified immunity unless the only issue is the purely factual question of the sufficiency of the plaintiffs' evidence of a constitutional violation. Other Circuit Courts have also recognized that *Behrens* limited *Johnson* and restored the fuller scope of interlocutory qualified immunity appeals. Despite the fact that all discovery is completed, and that the district court did not cite *Johnson* or cite any factual issues that would preclude a determination of qualified immunity, the Court of Appeals nonetheless dismissed the appeal, claiming lack of appellate jurisdiction under *Johnson*. In a prior appeal, another panel of that court, in this very same case, *accepted* jurisdiction and decided the issue of qualified immunity as to four other individuals who had originally been named as defendants in the case.

The disparate treatment of the various defendants in this case, as well as the Third Circuit's erroneous reading of *Johnson v. Jones* (which has been rejected by other circuits), warrants the granting of certiorari, and reversal of the Third Circuit, with directions to hear the merits of the qualified immunity appeal prior to trial.

B. The Third Circuit's Overly Broad Application of the Narrow *Johnson v. Jones* Exception to Immediate Appellate Review of Denials of Qualified Immunity Is Directly Inconsistent with the Holding and Policy Stated Very Recently In *Behrens v. Pelletier*

In *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), this Court re-affirmed the long-recognized importance of interlocutory appellate review in vindicating qualified immunity. In doing so, the Court narrowly construed *Johnson v. Jones*, 115 S. Ct. 2151 (1995), which held only that the collateral order doctrine did not apply where the claim of qualified immunity was based on an uncertain record as to whether the defendant did or did not do a specific act, and the appeal raised only a factual question of whether the plaintiff had sufficient evidence to create a factual issue of whether the defendants violated the plaintiff's rights.[3] *Id.* at 2159.

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3 To date, the Third Circuit has not issued any published opinion involving *Johnson v. Jones* to deny appellate jurisdiction over a denial of qualified immunity and has not considered *Behrens v. Pelletier*. However, the breadth which the Third Circuit has attached to *Johnson* is clearly demonstrated by comparing the two appeals decided by it in this case. A previous panel of the Court of Appeals in this same case *accepted* appellate jurisdiction before *Johnson* was decided. The Third Circuit, hearing the interlocutory appeal of four other individual defendants in this case, originally dismissed their appeal for lack of jurisdiction, but on rehearing, acknowledged that the appeal fell within the collateral order doctrine. *Christy v. Pennsylvania Turnpike Commission*, 1995 WL 127077 *1 n.4 (3d Cir. 1995), *on rehearing*, 54 F.3d 1140 (3d Cir.), *cert. denied*, 116 S.Ct. 340 (1995). While not all discovery had been completed, the same key evidence

(continued...)

In *Johnson* the factual dispute was very straightforward: whether the defendants were present or participated in an unconstitutional beating of the plaintiff. *Id.* at 2153-54. This Court concluded, for several reasons, that the fact question of whether the defendants participated in the beating suffered by the plaintiff was not truly a question of qualified immunity for which immediate appeal was available.[4] The *Johnson* decision dealt with a very narrow issue, because the only basis the defendants asserted in support of qualified immunity was a factual denial -- that they did not do it and that plaintiff had no evidence that they did do it. *Id.* at 2154. To the extent that Justice Breyer's opinion occasionally suggests that qualified immunity cannot be appealed wherever unresolved issues of fact remain, this Court's subsequent opinion in *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), clarified the matter.

In *Behrens*, the Court emphasized that "*Mitchell* [*v. Forsyth*] clearly establishes that an order rejecting the defense of qualified immunity at *either* the dismissal stage *or* the

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3(...continued)
which was cited in Christy's favor was before the court. The court noted that *Johnson* was pending before this Court, but had not been decided. The fact that a different panel of the same court has denied appellate jurisdiction on the same operative facts after *Johnson* demonstrates that in the Third Circuit *Johnson* has significantly but improperly narrowed the scope of interlocutory appellate review of qualified immunity, and that the Third Circuit has not corrected that scope of appellate review following *Behrens*.

4 The Court concluded that the claim asserted in that case (1) was not similar to the "purely legal" claim of qualified immunity asserted in *Mitchell v. Forsyth*, *Johnson*, 115 S.Ct. 2156, (2) did not satisfy the collateral order requirement that the issue being appealed is separate from the merits of the case, *Id.* at 2157, and (3) was not the sort of claim that was generally appropriate for appellate review, because it was fact-oriented and time consuming for appellate courts, *Id.* at 2158.

summary judgment stage is a 'final judgment' subject to immediate appeal." *Id.* at 839 (emphasis in original). The Court stated three times that denial of a summary judgment motion based on qualified immunity is immediately appealable. *See also Id.* at 840 and n.3. The Court also specifically addressed a *Johnson v. Jones*-type argument and clarified that *Johnson* was a narrow decision that should not be applied overbroadly.[5]

As the *Behrens* Court explained, it is not enough to rely on *Johnson v. Jones*, and show that some material issues of fact exist, in order to defeat qualified immunity.[6] In *Behrens* this Court rejected the overly broad reading of *Johnson* that carried the day in this case in the Court of Appeals:

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5 Justice Breyer, who wrote the opinion in *Johnson*, dissented in *Behrens*. As his dissent in *Behrens* indicates, Justice Breyer would take a generally narrow view of qualified immunity, and a correspondingly broad view of the *Johnson*-type exception. To the extent that these views are expressed in *Johnson v. Jones*, the majority opinion in *Behrens*, authored by Justice Scalia, clearly backs away from that view and reemphasizes the importance of qualified immunity as a policy.

6 Note the distinction in the burden of proof between summary judgment motions asserting qualified immunity from summary judgment motions based on the merits. In the latter case, summary judgment should always be denied where "genuine issues of material fact remain." If qualified immunity could not be granted where genuine issues of material fact remain, then it could *never* be granted prior to discovery when plaintiff has not yet had an opportunity to discover facts in support of his claim. But in fact, qualified immunity is frequently granted prior to discovery as the Court has emphasized it should be, because it is each defendant's belief, viewed objectively, that he was acting in conformance with the law, that entitles him to qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635 (1987). As argued *infra*, the overly broad application of *Johnson v. Jones* will nullify F.R.C.P. 56(e) in summary judgment motions asserting qualified immunity.

> Every denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, see F.R.C.P. 56, and *Johnson* surely does not mean every denial of summary judgment is non-appealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case.

116 S. Ct. at 842. The Court went on to conclude that a defendant can assert on appeal that his conduct satisfied the "objective legal reasonableness" standard even where the facts most favorable to the plaintiff would establish that the defendant violated clearly established law:

> Here the District Court's denial of petitioner's summary judgment motion necessarily determined that certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law. *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deems sufficiently supported for purposes of summary judgment met the *Harlow* standard of "objective legal reasonableness."

Id. *Behrens* confirms that defendants should not be deprived of their rights to pre-trial appellate review of qualified immunity merely because the record contains unresolved factual issues.[7]

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7 As argued *infra*, Section D, most circuit courts have concluded that (continued...)

The Court below ruled on the Petitioners' appeal as if Justice Breyer's dissent in *Behrens* had been the majority opinion, broadening *Johnson* and significantly limiting qualified immunity. Unlike *Johnson*, in this case it is not the petitioners' conduct that is in dispute, but rather the reasonableness of the conduct, viewed objectively. The actions of the petitioners, most of whom constitute the Personnel Committee, or served as Commissioners, are well documented and not challenged. Christy does not dispute what each defendant did, but only argues that those actions were taken with discriminatory intent. Whether each defendant acted reasonably, or with discriminatory intent, is different from the "I didn't do it" defense in *Johnson*, and clearly takes the appeal outside the scope of *Johnson*.

When evidence cited by plaintiff (i.e., plaintiff's conversation with Boschi, and Louis Sperduti's post-deposition affidavit) is taken in the light most favorable to plaintiff, there clearly remains an issue of law for the Court to determine: whether, under those facts, the other petitioners could reasonably have believed their conduct comported with *Rutan*. Unlike *Johnson*, where no such legal issue was raised, this case presents the legal question of whether petitioners are still entitled to qualified immunity that falls squarely within the collateral order doctrine.

This Court should grant a Writ of Certiorari to correct the conflict between the Third Circuit's approach to reviewing qualified immunity and the *Behrens* decision.

7(...continued)
Behrens significantly limits *Johnson*.

C. The Third Circuit's Refusal to Accept Jurisdiction of the Qualified Immunity Claims Requires the Defendants to Stand Trial Without Any Resolution of Their Qualified Immunity Claims

Trial is scheduled in this case for January 13, 1997. Petitioners will be forced to stand trial without any appellate review or resolution of their qualified immunity claims unless this Court directs the Third Circuit to accept jurisdiction over the current appeals. Under the Third Circuit's decision in this case, defendants have no pre-trial review of their qualified immunity claims, effectively nullifying the collateral order doctrine. The importance of pre-trial appellate review of a denial of qualified immunity has been stressed by this Court repeatedly, since erroneous denial of qualified immunity that is not addressed until after a trial is effectively lost. *Behrens v. Pelletier*, 116 S. Ct. 834 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 524-25 (1985) (qualified immunity "is effectively lost if a case is erroneously permitted to go to trial"). As noted below, this is an unfair result because all discovery is completed; there will be no additional facts to create issues relating to qualified immunity. Further, following the procedure in F.R.C.P. 56(e), each defendant put forth unrefuted sworn testimony and declarations denying any discrimination against plaintiff on the two promotions.

In *Behrens*, the Court noted that "if the District Court rules erroneously, the qualified immunity right not to be subjected to pre-trial proceedings will be eliminated, so long as the plaintiff has alleged (with or without evidence to back it

up) violation of "clearly established" right. . . ." -- a result the Court found to be "intolerable."[8] 116 S.Ct. at 842.

If the Third Circuit's broad interpretation of *Johnson* is allowed to stand, then it will improperly deny appellate review -- the only effective remedy -- to appellant-defendants who have a bona fide claim of immunity. *Johnson* only denies appellate review to defendants whose claim of qualified immunity amounts to nothing more than a denial that they "didn't do it." Here, qualified immunity is based on the fact that petitioners reasonably could believe that the actions they took, which are undisputed, were lawful under *Rutan*. If such a claim is not reviewed by an appellate court, then the second half of the qualified immunity standard is meaningless in the Third Circuit.

In dismissing the appeal as to all petitioners, per curiam, the Third Circuit did not state whether the factual record would preclude a reasonable defendant in the position of each appellant from believing he or she was complying with *Rutan*. This omission is unfair because it leaves petitioners (each of whom relied on different facts), in suspense as to why they cannot receive a pretrial appellate ruling on their claim of qualified immunity. The second part of the qualified immunity standard necessarily requires individualized consideration of the circumstances of each individual defendant, since each defendant's conduct must be viewed in light of the information that he or she possessed. *See Anderson*, 483 U.S. at 641.

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8 Under the facts presented in *Behrens*, the defendant had previously appealed a denial of qualified immunity, but the Court of Appeals ruled on the appeal without reaching the issue, so that when the Court of Appeals subsequently dismissed the defendant's second appeal of qualified immunity, the defendant was left without any appellate pre-trial review of his qualified immunity defense. *Id.* at 840.

This Court should grant a Writ of Certiorari to effectuate the important policy requiring pre-trial determination of qualified immunity, which the Third Circuit is not honoring.

D. The Third Circuit's Overly Broad Application of the Narrow *Johnson v. Jones* Exception is Directly Contrary to the Prevailing Law in Other Circuits

In light of *Behrens v. Pelletier*, other Circuit Courts of Appeals disagree with the Third Circuit and hold that *Johnson v. Jones* ought to be read narrowly to deny appellate review of qualified immunity only when the sole issues on appeal are issues of evidentiary sufficiency.

Second Circuit. The Second Circuit has very recently explained that in light of *Behrens*, the *Johnson* decision is not as broad as it first seemed:

> Though it was arguable that *Johnson* intended to preclude an interloctory appeal whenever a district judge denied summary judgment on the ground that a material fact was genuinely in dispute, the Court's subsequent decision in *Behrens* dispelled such a notion. In *Behrens*, the District Court had denied summary judgment precisely on the ground that a disputed issue of fact existed, *id.* at 838, yet an appeal was not precluded, *id.* at 842. Thus, *Behrens* laid to rest any possibility that a district court's mere assertion that disputed factual issues existed was enough to preclude an immediate appeal.

> After *Johnson* and *Behrens*, several types of fact-related rulings remain appealable. The clearest example is where the defendant appeals the denial of an immunity defense on the ground that, on stipulated facts, the defense has established as a matter of law. Similarly, an appeal is available where the defendant accepts, for purposes of the appeal, the facts as alleged by the plaintiff. *See e.g., Jemmott v. Coughlin*, 85 F.3d 61, 66 (2d Cir. 1996). Indeed, *Behrens* goes further and permits an appeal where a defendant contends that the immuity defense is established on those facts, alleged by the plaintiff, that the district court ruled were sufficiently supported to create jury issues. As *Behrens* explained, *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of "objective legal reasonableness." *Id.* Even if the district court did not identify the particular charged conduct that it deemed adequately supported, *Johnson* permits an appeal, although it acknowledges that a "court of appeals may have to undertake a cumbersome review of the record to determine what facts the District Court, in the light most favorable to the non-moving party, likely assumed." *Johnson*, 116 S. Ct. at 2159; *Behrens*, 115 S. Ct. at 842.

Salim v. Proulx, 1996 U.S. App. LEXIS 21758, *8 - *10 (2d Cir. August 23, 1996). After a thorough analysis of the two most recent Supreme Court decisions, the Second Circuit

concluded that while the sufficiency of plaintiff's evidence may not be reviewed in a interlocutory appeal,

> An appeal is available, however, to challenge the trial judge's rejection of the immunity defense where the defendant contends that on stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find, the immunity defense is established as a matter of law because those facts show either that he "didn't do it" or that it was objectively reasonable for him to believe that his action did not violate clearly established law.

Id. at *12-*13. Following this analysis, the Second Circuit accepted jurisdiction over the appeal and granted qualified immunity where the defendant asserted that on plaintiff's version of the facts he was entitled to immunity.

In *Jemmott v. Coughlin*, 85 F.3d 61 (2d Cir. 1996), the Court accepted jurisdiction despite the existence of factual disputes regarding the defendants' actions and intent because:

> For the purpose of this appeal . . . the defendants are not contesting the sufficiency of plaintiff's proof, or the district court's ruling that disputed issues of fact require the denial of their summary judgement motion. Instead, they argue that *even if plaintiff's allegations are accepted as true*, no clearly established constitutional right was violated.

Id. at 66 (emphasis added). The court affirmed the district court's denial of summary judgement, holding that "the acts of

each defendant, *if true as alleged*, were sufficiently severe" such that no rational jury could conclude that it was objectively reasonable for the defendants to believe that their behavior did not violate clearly established law. *Id.* (emphasis added). The Second Circuit therefore accepts jurisdiction of qualified immunity appeals despite the presence of material issues of disputed fact, simply viewing such facts in the light most favorable to the plaintiff, so long as the appeal is presented as a "failure to state a claim" question of law. The Second Circuit *denies* appellate jurisdiction only where "the adjudication of the qualified immunity defense *requires* the resolution of genuninely disputed questions of fact." *In re: State Police Litigation*, 88 F.3d 111, 124 (2d Cir. 1996) (emphasis added).

Fifth Circuit. The Fifth Circuit has applied *Johnson* and *Behrens* in a similar manner to the Second Circuit, but focuses on the facts assumed by the district court rather than the facts alleged by the plaintiff. The court has made clear that, under *Behrens* and *Johnson*, disputes of fact do not deprive the court of appellate jurisdiction over qualified immunity appeals unless the appeal seeks a review of "'the evidence sufficiency issue' (i.e. whether the nonmovant presented sufficient summary judgment evidence to create a dispute of fact)." *Nerren v. Livingston Police Dept.*, 86 F.3d 469, 472 (5th Cir. 1996). The court will retain interlocutory jurisdiction and "'take, as given, the facts that the district court assumed when it denied summary judgement' and determine whether these facts state a claim under clearly established law." *Id.* (quoting *Johnson*, 115 S.Ct. at 2159). *See also Cantu v. Rocha*, 77 F.3d 795 (5th Cir. 1996) (accepting appellate jurisdiction and deciding legal claim issue based on alleged facts where moving party did not dispute alleged facts, but only argued that even if facts as alleged were true, plaintiff had failed to state a claim).

Seventh Circuit. The Seventh Circuit considers *Behrens* to be incongruous with rather than supplemental to *Johnson*. In *Clash v. Beatty*, 77 F.2d 1045, 1046 (7th Cir. 1996), the court explained that *Johnson* prohibits appellate jurisdiction over qualified immunity appeals if the district court order denying summary judgement "is based on the existence of genuine issues of fact that require a trial." The court went on to explain that "[c]onversely," *Behrens* and *Mitchell* held that an order denying summary judgement based on qualified immunity is immediately appealable "where the issue [is] whether the facts alleged showed a violation of a 'clearly established' law." *Id.* (citing *Behrens*, 116 S.Ct. 834; *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). The task of any court evaluating qualified immunity is then to decide under which of the two frameworks the moving party's qualified immunity defense falls. *Id.* If the district court opinion denying summary judgment was premised on a need for factual development in order to decide the question of qualified immunity, the court lacks appellate jurisdiction under *Johnson*. If the appeal involves only legal issues regarding "the possible application of qualified immunity," the court has jurisdiction under *Behrens* and *Mitchell*. *Id.*

Applying these principles in *Clash*, the court found that key facts relating to the objective reasonableness of the defendant's actions were unknown and disputed. *Clash*, 77 F.3d at 1048. While the physical actions of the defendant were not in dispute, the effects and circumstances surrounding those actions were in dispute. Therefore, the court dismissed the appeal for lack of jurisdiction, finding that the disputed facts must be developed before a definitive ruling on the immunity issue could be made. *Id.*

Eighth Circuit. The Eighth Circuit has summarized its application of *Behrens* and *Johnson* as follows:

> If the issue concerns whether a certain point of law is clearly established, or whether reasonable officials would have known based on the facts available to them that their actions violated the law, the order [denying summary judgement based on qualified immunity] is immediately appealable. . . . If, on the other hand, the issue on appeal is whether the pretrial record creates a genuine issue of material fact as to the occurrence of particular conduct, the order is not immediately appealable.

McGuire v. Schriro, 1996 U.S. App. LEXIS 11546 (8th Cir. May 21, 1996) (citations omitted) (unpublished opinion). In the Eighth Circuit, the existence of factual issues relating to qualified immunity does not preclude interlocutory appeal. Where issues of fact exists, the court simply accepts the facts that the District Court assumed in denying qualified immunity. *Eagle v. Morgan*, 88 F.3d 620, 624 (8th Cir. 1996) ("in resolving this appeal, we will take, as given, the facts that the District Court assumed when it decided summary judgment ...") (quoting *Johnson*, 115 S. Ct. 2159).

In *Heidemann v. Rother*, 84 F.2d 1021, 1027 (8th Cir. 1996), the court accepted appellate jurisdiction over an appeal from a denial of summary judgement based on qualified immunity where the district court had without elaboration rejected qualified immunity because of material issues of fact. The Eighth Circuit was able to address the appeal withou deciding facts by analyzing "(1) what material facts are not genuinely in dispute, viewing the evidence in the light most favorable to plaintiffs, and (2) whether, assuming such facts, defendants infringed a clearly established constitutional or statutory right." *Id.* In conducting this analysis, the court recognized that the mere presence of disputed material facts in

an appeal does not deprive the court of jurisdiction over the entire appeal.

Ninth Circuit. The Ninth Circuit reviewed *Behrens* and *Johnson* together in *Tagupa v. Odo,* 1996 U.S. App. LEXIS 20489 (9th Cir. August 8, 1996) (unpublished opinion), a case in which the controlling law was clearly established and the only qualified immunity issue on appeal was whether defendant's conduct was objectively reasonable in light of the controlling law. In light of *Behrens*, the court accepted jurisdiction and granted qualified immunity because "all of the conduct alleged by *Tagupa* and accepted as true for the purposes of this appeal was objectively reasonable in light of existing law." Id. at *6.[9]

Eleventh Circuit. The Eleventh Circuit takes a slightly different approach, but still recognizes that the existence of disputed facts does not preclude interlocutory review of qualified immunity. In *McMillian v. Johnson*, 88 F.3d 1554, 1563 (11th Cir. 1996), the Court held that "an appellate court may address a district court's resolution of factual issues when the core qualified immunity issue is also raised on appeal from a denial of summary judgement." As long as the sufficiency of the plaintiff's evidence is not the only issue raised on appeal, the court held that it could consider an appeal containing disputed material facts, and in fact could address "challenges to the district court's determination that genuine issues of fact exist as to what conduct the defendant engaged in." *Id.* In

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9 The Ninth Circuit also briefly discussed *Johnson* and *Behrens* in *Osolinski v. Kane*, 1996 U.S. App. LEXIS 20103 (9th Cir. August 12, 1996), and while noting that the Supreme Court in *Behrens* "clarified its holding in *Johnson*", the qualified immunity issue before the court was whether the relevant law was clearly established, an issue that is clearly appealable under either case.

addressing such an appeal, the court may then undertake a review of the facts in the light most favorable to the non-moving party, or may accept the district court's determination of the relevant facts, *id.*, just as indicated in *Behrens*.

The court addressed *Behrens* and *Johnson* even more directly in *Cottrell v. Caldwell*, 85 F.3d 1480 (1996), in which it wrote "as clarified by *Behrens*, *Johnson* does not affect our interlocutory jurisdiction in qualified immunity cases where the denial is based even in part on a disputed issue of law." *Id.* at 1485. The Court also held that appellate jurisdiction exists even where the district court denied qualified immunity with an unadorned statement that '[m]aterial issues of fact remain...'"[10] *Id.* at 1485 (citing *Behrens*, 116 S.Ct. at 838). Appellate jurisdiction exists regardless of the presence or extent of issues of disputed fact, so long as the appeal raises the legal issue of clearly established law or the issue of the objective reasonableness of an actor's behavior in light of the law.

In any of these circuits, the *Johnson* decision would not have prevented the court from hearing Petitioners' qualified immunity clalim. Where circuit courts have denied appellate review following *Behrens*, it has been on a set of facts that fits within the narrow scope of *Johnson*, not simply where the record contains an issue of disputed facts. *See, e.g., McGuire v. Schriro*, 1996 U.S. App. LEXIS 11546, at *3 (8th Cir. May 21, 1996) (denying jurisdiction because issue of fact remained

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10 The *Cottrell* Court actually disapproved two prior decisions that followed *Johnson* but were incompatible with *Behrens*. *Id.* at 1485 (citing with disapproval *Mastroianni v. Bowers*, 74 F.3d 236 (11th Cir. 1996) (holding that under *Johnson* appellate jurisdiction existed only for appeals involving whether the relevant law was clearly established); *Babb v. Lake City Community College*, 66 F.3d 270 (11th Cir. 1996)(same)).

"as to the occurrence of particular conduct"); *Marquez v. Miranda*, 1996 U.S. App. LEXIS 10972, at *5 (9th Cir. April 8, 1996) (unpublished decision) (denying jurisdiction because outcome of appeal depended on factual question whether the defendants actually read the plaintiff's legal mail). Like *Johnson*, in these cases, the appeals depended on questions as to whether the alleged conduct actually occurred or not, not whether the conduct was reasonable under the circumstances. Therefore, the courts properly denied jurisdiction under *Johnson*.

The *Behrens* decision should have made a difference in the way the Third Circuit addressed qualified immunity appeals, as it has in other circuit court decisions issued since *Behrens* was decided. Before *Behrens*, circuit courts following *Johnson* dismissed appeals that raised the second part of the qualified immunity test, whether the defendant's conduct was objectively reasonable under the circumstances. *See, e.g., Myers v. Oklahoma County Board of County Commissioners*, 80 F.3d 421, 424-25 (10th Cir. 1996) (dismissing appeal of qualified immunity based on issue of whether defendant's actions were objectively reasonable); *Mick v. Brewer*, 76 F.3d 1127, 1133 (10th Cir. 1996) (holding that *Johnson* "displaced" Tenth Circuit precedent allowing most qualified immunity appeals and affectively limits the court to review only whether the law was clearly established); *Carter v. Rhode Island*, 68 F.3d 9, 13 (1st Cir. 1995) (emphasizing that *Johnson* changed the court's prior approach on qualified immunity appeals -- "*Johnson* announces a jurisdictional rule -- signaling a new day in the First Circuit" -- and dismissing an appeal that involved whether defendant's actions were objectively reasonable).

Following *Behrens*, circuit courts are now accepting jurisdiction over the question of whether the defendant's actions were objectively reasonable. *See, e.g., Nerren v. Livingston*

Police Department, 86 F.3d at 472 (holding that under *Behrens*, that the defendant can assert an appeal claiming that a reasonable official would have believed his conduct was consistent with clearly established law); *Heidemann v. Rother*, 84 F.3d. at 1027 (finding no impediment to raising question of objective legal reasonableness on appeal).

Rather than recognizing the significance of *Behrens*, the Third Circuit order in this case ignored it and continues to apply the *Johnson* exception broadly. The Petitioners in this case are asserting qualified immunity on the basis that reasonable officials under the circumstances would have believed that their actions were consistent with *Rutan*. This Court should grant the Writ of Certiorari in order to address the direct inconsistency between the Third Circuit's practice under *Johnson* and the practice of other circuits under *Behrens* in considering appeals raising this issue.

E. The Third Circuit's Overly Broad Application of the Narrow *Johnson v. Jones* Exception Threatens to Swallow the Collateral Order Doctrine and F.R.C.P. 56(e) For Summary Judgment Motions Asserting Qualified Immunity

Under the Third Circuit's interpretation of *Johnson* in this case, a summary judgment motion asserting qualified immunity can be defeated whenever summary judgment on the merits would be defeated -- by showing the existence of an issue of fact relating to the defendants' conduct or actions. The result is that qualified immunity will no longer be an immunity from litigation, but merely a defense at trial. *Behrens* recognized that issues of fact need not preclude appellate determination of qualified immunity claims, regardless of

whether the issue is if the law was clearly established or if the defendants' actions satisfied the objective legal reasonableness standard. In *Behrens*, this Court specifically cautioned that *Johnson* should not defeat a defendant's ability to assert either prong of qulaified immunity in an interlocutory appeal, unless the appeal only challenged the sufficiency of plaintiff's evidence. 116 S. Ct. at 842. As set forth *supra*, section D, most circuits have heeded this caution.[11] Unless the Third Cicuit's view of appellate jurisdiction is brought into line with the approach of *Behrens* and most other circuits, government officials in the Third Circuit will not be able to vindicate legitimate claims of "objective legal reasonableness" at the summary judgment stage.

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11 The District of Columbia Circuit has very recently addressed the summary judgment standards that should apply when defendants assert qualified immunity in cases where proof of intent is an essential element of the plaintiff's case. *Crawford-El v. Britton*, 1996 U.S. App. LEXIS 21970 (D.C. Cir. August 27, 1996)(en banc). Recognizing the importance of early resolution of qualified immunity claims, the court "read *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] as calling for alternative rules to protect officials" who assert qulified immunity under Rule 56. *Id.* at *3. Thus, the Circuit Court held that a defendant is entitled to summary judgment under qualified immunity "unless the plaintiff offers *clear and convincing evidence* on the state-of-mind issue. . ." *Id.* While this Court need not address the District of Columbia Circuit's holding in resolving the issues raised in this Petition, the thoughtful and provocative opinion in *Crawford-El* highlights the problem that *Johnson* can create in trying to vindicate qualified immunity at the summary judgment stage. *See id.* at *35 ("*Johnson* is not remotely so sweeping" as to subordinate the goal of early resolution of qualified immunity to normal summary judgment procedures).

CONCLUSION

For the above reasons, Petitioners respectfully request that the Court grant a Writ of Certiorari in this case.[12]

Respectfully submitted,

Michael M. Baylson
Attorney of Record
Frank E. Noyes, II
DUANE, MORRIS & HECKSCHER
One Liberty Place
Philadelphia, PA 19103-7396
(215) 979-1150/1138

Attorneys for all Appellants

Of Counsel:

Kevin F. Longenbach, Esquire
Pennsylvania Turnpike Commission
P.O. Box 8531
Harrisburg, PA 17105
(717) 986-9617

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12 In view of the conflict of the decision below with past decisions of this Court, e.g. *Behrens v. Pelletier*, *supra*, and *Mitchell v. Forsyth*, *supra*, the Court may wish to consider summary reversal and remand this matter to the Third Circuit with instructions that it accept jurisdiction and consider Petitioners' qualified immunity appeal on the merits.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES CHRISTY	: CIVIL ACTION
VS.	: NO. 93-3346
PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JAMES L. DODARO, HOWARD YERUSALIM, FRANK A. URSOMARSO, JAMES F. MALONE, III, JOHN L. SOKOL, JR., S. MICHAEL PALERMO, JOSEPH L. DIRIENZO, SAMUEL S. CARNABUCI, MELVIN M. SHELTON, DEBORAH KOVAL, JOHN A. BOSCHI, VINCENT J. GRECO, JOHN A. STEWART, GEORGE PILECKI and SEAN PILECKI	:

MEMORANDUM

JOYNER, J. NOVEMBER 6, 1995

Before this Court is each Defendant's Motion for Summary Judgment against Plaintiff, Charles Christy.[1] In 1994,

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[1] Defendants are John Boschi, who is represented separately, and the Pennsylvania Turnpike Commission (PTC), Robert Brady, James L. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L. Dirienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Koval, Vincent J. Greco, John A. Stewart,

this Court denied the original Defendants, the Pennsylvania Turnpike Commission, Brady, Boschi, Greco and Stewart's Motion for Summary Judgment. 845 F. Supp. 1097. This ruling was affirmed on interlocutory appeal by the Third Circuit in 1995 and certiorari denied by the United States supreme Court. 54 F.3d. 1140. Now, after almost 2,000 pages of evidence and over 300 pages of briefing submitted to this Court, these Motions are ready to be resolved.[2]

The nutshell version of Christy's Amended Complaint is that he is an employee of the Pennsylvania Turnpike Commission (PTC). In early 1993, Christy applied to be promoted from Mechanic to Foreman of the Line Painting Crew. Another PTC employee named Sean Pilecki received the promotion instead of Christy. After the original complaint in this action was filed, Christy applied for and was denied a promotion to Regional Fleet Equipment Manager-East. He lost that promotion to a PTC employee named Frank Dunn and subsequently amended his complaint to reflect this occurrence.

Christy alleges that he would have received both promotions if it were not for the fact that Pilecki and Dunn were politically sponsored employees. Christy alleges that political

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George Pilecki and Sean Pilecki.

The individual Defendants are all present or former employees of the PTC in positions ranging from Commissioner to Personnel Committee Member to Road Line Painter. The Defendants other than Boschi are jointly represented. We will refer to all Defendants bur Boschi as "PTC Defendants" and all Defendants as "Joint Defendants.

[2] We find that the record is sufficient for us to make our decision and deny Joint Defendants' request for oral argument on these motions.

patronage promotions are endemic at the PTC and that this practice violates his First Amendment right to be free to politically associate or not politically associate as he chooses.

Standard of Review

In considering a motion for summary judgment, a court must consider whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must determine whether the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In making this determination, all of the facts must be viewed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of the non-moving party. Id. at 256. Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the non-moving party must establish the existence of each element of its case. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

Discussion

Joint Defendants contend that summary judgment should be granted for two reasons; first, that they are entitled to judgment as a matter of law; second, that they are entitled to qualified immunity from suit.

1. First Amendment

Christy brings his First Amendment claims under the Supreme Court's ruling in Rutan v. Republican Party, 497 U.S. 62, 64 (1990). This case ruled that public agencies cannot promote public employees based on their political affiliations unless employee's work requires political allegiance. Id.; Robertson v. Fiore, 62 F.3d 596, 599 (3d Cir. 1995). Rutan was simply an extension of the standards laid down in Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980), which prohibited political discrimination in hiring, transferring and discharging public employees.

To apply Rutan, we ask whether (1) the employee works for a public agency in a position that does not require political allegiance, (2) the employee maintained an affiliation with a political party and (3) the employee's political affiliation was a substantial or motivating factor in the adverse employment decision. Robertson, 62 F.3d at 599 (citing cases). If an employee can show those three elements, the burden shifts to the employer to show that it would have made the same employment decision anyway. Id. If the employer cannot make that showing, then the employee is entitled to a verdict in his or her favor.

Joint Defendants concede that Christy meets the first point because neither of the positions he applied for require political allegiance. They do, however, contest the second two elements and also argue that there were legitimate reasons for not promoting Christy.

The first issue for us, then, is whether Christy had a political affiliation.[3] Christy asserts that he remained politically

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[3] It is established that an employee can show a protected political affiliation even if he or she is a member of the same political party as his or her employer so long as the employer and employee are members of competing identifiable factions within

neutral in the work-place and therefore did not receive the political support he needed.[4] PTC Defendants argue that an affiliation with a political party is necessary. Since Christy denies a work-place affiliation, they assert he cannot meet this second element, and summary judgment must be granted.

We do not read Robertson so narrowly. The point of Rutan is to prevent on-the-job coercion to align oneself politically. 497 U.S. at 76. The right not to politically associate is as protected as the right to associate. Id.; Bennis v. Gable, 823 F.2d 723, 731 (3d Cir. 1987). Christy alleges that he was not promoted because he refused to curry political favor with people such as Commissioner Brady who could ensure his promotion and that others were promoted because they did curry such favor. We find that if proven, this could state a claim under Rutan.

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that same party. Robertson, 62 F.3d at 600.

[4] According to PTC Defendants, Christy has gone through three completely different theories of his case. They assert that in his original complaint, he argued that Pilecki was promoted to Pain Crew Foreman due to political favoritism for Pilecki. Then, in response to the original Defendants' motion for summary judgment, he argued that he was discriminated against because he belonged to an alleged Chester County faction of the Democratic Party, whereas Commissioner Brady belonged to the alleged Philadelphia County faction of that party. Now, Christy alleges that he was discriminated against because he remained politically neutral at work. We do not see as much of a difference between these theories as PTC Defendants do because they all, at base, assert that Pilecki and Dunn had political pull and therefore received promotions, whereas Christy had no pull and was not promoted. Moreover, we will not penalize a plaintiff for refining a theory over time.

PTC Defendants also argue that Christy cannot assert that he was politically neutral because he listed political activities on his resume. Christy maintains that he was not political within the work-place and did not affiliate himself politically with the right people. We find that this allegation is not inconsistent with his political activities outside of work with people other than those in power at the PTC.

Given the above, we turn to Robertson's final element, whether Christy's political affiliation or non-affiliation was a substantial or motivating element in the PTC's employment decisions. To fully understand Christy's contentions, an understanding of the PTC's promotion process is necessary.

Promotions in the PTC are governed by Policy Letter 65. This Policy Letter was issued in response to Rutan and is intended to guarantee merit promotions. Policy Letter 65 requires the following for making promotions. First, candidates must be solicited from the district where the opening is by posting the job description for ten days. The PTC's Human Resources Department forwards all applications to the appropriate Manager. The Manager, together with the appropriate Deputy Executive Director, selects three to six candidates to forward to the Personnel Committee.

Here Boschi chose three candidates for each position after first selecting a team of Interviewers to interview the applicants. The interviewers were Boschal, Greco and Stewart for the Paint Crew Foreman position and Stewart and non-defendants Mike McClurkin and Jack Doyle, for the Regional Manager position. The interviewers gave number scores to each candidate for a number of categories such as computer knowledge and supervisory experience. Boschi identified the top three scorers, summarized their interview evaluations in a Recommendation Memo and forwarded that Memo and supporting documents such

as the three candidates' applications (jointly, Personnel Documents) to the Personnel Committee. According to Policy Letter 65, the Personnel Committee reviews the Personnel documents and from them, chooses one candidate to recommend to the Commissioners for final approval. In practice, the Commissioner vote is a rubber-stamp approval, since the Commissioners vote on all personnel recommendations in a single vote together with all requisition and purchase order items.

Christy alleges that in his case, the initial paperwork was skewed so as to ensure that the politically supported candidate appeared to have the best credentials for the promotion. He presents evidence indicating that his interviews were sham, that he was never asked questions for which answers were provided on his evaluation sheets (such as whether he had computer or supervisor experience) and that he was more qualified for the promotions than either Pilecki or Dunn. Christy also presents evidence that each level above the interview level was aware that political patronage ensured promotions and that each person participated in that program.

Christy's evidence takes the form of his own affidavits and notes he made during the promotion process. One of Christy's affidavits states that soon after he was denied the promotion to Paint Crew Foreman, he asked Boschi for an explanation. According to Christy, Boschi told him that promotions were made on the basis of political patronage, that Sean Pilecki received the promotion because he was supported by Commissioner Brady, that without political support Christy would never be promoted and that he should align himself with Commissioner Brady or State Senator Vincent Fumo.

After this conversation, Christy transcribed what he remembered was said, and proffers these contemporaneous notes to support his affidavit. Indeed, Boschi agreed in his deposition

that he and Christy had this conversation, although he remembers its contents differently. For example, Boschi testified that he merely speculated to Christy that political patronage ensured Pilecki's promotion, not that it was the actual reason for the employment decision.

Further, Christy proffers an affidavit from Louis Sperluti, a former supervisor of both Christy and Pilecki. Sperluti avers that Boschi told him that Frank Dunn received his promotion because his father pulled political connections for him. In addition, Sperluti avers that Pilecki's father told him that he was using political connections to get his son the promotion. Finally, Sperluti testified that he overheard Christy and Boschi's conversation and supports Christy's memory of its contents.

It is easiest to present the Joint Defendants' evidence by simply stating that they vigorously deny each of Christy's allegations and, in fact, present evidence that flatly contradicts much, if not all of it. They present affidavits and deposition testimony of each Defendant averring that none has personally participated in political patronage promotions nor is aware of any other PTC employee or officer participating in political patronage promotions.

Joint Defendants also make legal arguments why summary judgment should be granted. First, they assert that Christy's evidence consists solely of speculation, rumor, hearsay, and innuendo and therefore is inadequate to withstand a motion for summary judgment. They compare Christy's evidence to that presented in Liotta v. Borough of Springdale, 985 F.2d 119, 122 (3d Cir. 1993). There, the plaintiff presented three affidavits, two of which simply state that the affiants "believe that [plaintiff] was terminated due to political reasons." The third did not say much more. The Third Circuit held that a person's "belief" of the cause of a termination is mere speculation and is therefore insufficient

to withstand a motion for summary judgment. Id.

Second, Joint Defendants contest whether Christy has demonstrated causation between his political affiliation and the PCT's employment decisions. They attribute any behind-the-scenes maneuvering that may have taken place to family or friendship loyalty and nothing more. According to Joint Defendants, Christy asserts that the First Amendment is violated every time an elected or otherwise influential person acts as a reference for a friend or former employee. Further, Joint Defendants challenge whether several Defendants, namely the Commissioners, were aware of Christy's political affiliation or eve knew him, Pilecki or Dunn. Laskaris v. Thornburgh, 733 F.2d 260, 265 (3d Cir.), cert. denied, 469 U.S. 886 (1984) (summary judgment when no evidence that defendants aware of plaintiff's political affiliation); Cusson-Cobb v. O'Lessker, 953 F.2d 1079, 1081 (7th Cir. 1992) (same); McMillian v. Sventanoff, 878 F.2d 186 (7th Cir. 1989) (simply possessing different political beliefs than employer does not create First Amendment claim); Corrigan v. Rhode Island Dep't of Business Regs., 820 F. Supp. 647 663-64 (D.R.I. 1993) (no allegation or evidence that plaintiff's politics caused lack of sponsorship).

Related to the above argument, PTC Defendants contend that at most, Christy's evidence only shows basic favoritism for particular employees. This, they assert, does not violate the Constitution. They cite Asko v. Bartle, 762 F. Supp. 1229 (E.D. Pa. 1991), where our Court held that an employer may legally discharge friends of political rivals because friendship is not an association protected by the First Amendment. Id. at 1231. See also Boger v. Wayne County, 90 F.2d 316, 323 (6th Cir. 1991) (same); Correa-Martinez v. Arillaga-Belendez, 903 F.2d 49 (1st Cir. 1990) (same); Green v. City of Montgomery, 792 F. Supp. 1238 (M.D Ala. 1992) (favoritism for a former assistant acceptable to Constitution).

Fourth, Joint Defendants argue that mere "involvement" in adverse employment issues is insufficient to state a claim for First Amendment rights violations. They contend that Boschi, Greco and Stewart recommended Christy and two others for the Paint Crew Foreman position and that this cannot be construed as an adverse employment action. Similarly, PTC Defendants contend that there is evidence that the Personnel Committee members and the Commissioners were not even aware that Christy was interested in the Regional Fleet Manager-East position because he was not one of the three final candidates and therefore, his name was not on the Recommendation Memo.

Finally, the PTC Defendants argue that summary judgment is appropriate because regardless of Christy's showing, he would not have been promoted anyway due to the other employees' higher qualifications as demonstrated by the Personnel Department.

We find that taking Christy's evidence as true and making reasonable inferences in his favor, Christy has demonstrated the existence of genuine issues of material fact. He has proffered evidence from Sperluti and himself that according to Boschi, he did not receive the promotions because he was not politically connected and that the decisions to promote Pilecki and Dunn were made by either the Personnel Committee or the Commissioners.

Although no party frames the issue this way, it appears that Christy's claim is one for reverse discrimination. He alleges that other people were promoted over him and his better qualifications merely because he did not have political support and they did. When Christy's claim is viewed in this light, Joint

Defendants' arguments become less persuasive.[5] We analogize

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[5] We take this opportunity to recognize that many of Defendants' arguments rebutting many of Christy's and evidence are persuasive. We do not address these, however, because they do not affect our finding that there are legitimate disputes that make this case one for a jury.

For example, from the record today it appears that Christy's evidence about the P PTC's pre-Rutan promotion practices are irrelevant to this post-Ratan claim, as are the preRutan employment audits. Similarly, we disregarded all Christy's evidence as to the political nature of entry-level hiring at the PTC because of the dramatically different systems provided for in Policy Letter 65 (promotions) and Policy Letter 66 (hiring). Notably, it appears that Policy Letter 66 specifically allows for political influence. Because of these allowed differences, our preliminary finding is that hiring practices have no relevance to the PTC's promotional practices.

Further, we agree with Defendants that much of Christy's pleadings do rely on insupportable leaps of logic. An example is the following passage, found at page 138 of Plaintiff's Response

Motions (citations omitted).

> Joan Zucker (Brady's secretary) had numerous telephone conversations with George Pilecki during the period of time that the Commission was considering his [son] Sean Pilecki's request to become Paint Crew Foreman. Joann Zucker stated that the discussions she had with George Pilecki were limited to the summer months and concerned only the community picnic. Logic, however, dictates a different conclusion - that she was acting as a liaison

Christy's claim to Bennis, where the Third Circuit permitted the apolitical plaintiffs to go to trial because, although there was no political animosity against them personally, they were demoted to make room for political supporters. 823 F.2d at 731.

First, we find that although much of Christy's evidence is speculative, enough of it is not, and it is that evidence upon which we rely. For example, Boschi allegedly told Christy that he did need the support of either Brady or Senator Fumo or he would not be promoted. Further, Boschi allegedly told Christy and Sperluti that Pilecki and Dunn did not have political support from Brady and Senator Mello. These affirmative statements are a far cry from the speculative "I believe plaintiff was discharged for political reasons," statements in Liotta, 985 F.2d at 122.

Second, we find that Christy has presented adequate evidence to demonstrate causation. Boschi's alleged statements that Pilecki and Dunn had political support is sufficient to create at least a question of fact as to what kind of support they actually had (if any); political or friendship. If it is a political, then Christy has made out a First Amendment claim.

Joint Defendants' strongest argument for a summary judgment is their third, based on the Rhode Island case of

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between Grady and George Pilecki.

We agree with Defendants that this passage, and others like it, have no legal standing to create issues of material fact.

Recognizing that, however, does not remove the fact that Christy has presented cognizable evidence to support his assertions and it is on these facts that we rely to deny summary judgment.

Corrigan, 820 F. Supp. at 664. There, the Court held that plaintiff did not demonstrate an illegal political sponsorship situation when the plaintiff failed to allege that "his politics, his ideology, or his advocacy of political goals led to his downfall." Id. Rather, the Court found that any sponsorship plaintiff's co-worker received was due to family loyalty and that nothing in the record suggested that plaintiff "could have attained sponsorship by altering his political beliefs or affiliations." Id.

PTC Defendants have argued that Christy has not alleged that "his politics, his ideology, or his advocacy of political goals led to his downfall." However, we find that there is some evidence to indicate that Christy's lack of sponsorship was politically related. Notably, Boschi's alleged statements that Christy should align himself with Brady or Senator Fumo indicate that Christy could have "attained sponsorship by altering his political beliefs or affiliations." For this reason, we find an issue of fact as to whether Christy's apolitical affiliation prejudiced him.

Joint Defendants' fourth argument, that mere involvement in an adverse employment decision does not state a claim, disregards Christy's contention that all Defendants actively participated in a plan to promote the candidate previously selected on the basis of political patronage. Further, their assertion that Boschi, Stewart and Greco aided Christy by placing him on the Paint Crew Foreman Recommendation Memo ignores Christy's evidence that they skewed that Memo to make Pilecki appear to have the best qualifications. We find that if Christy's version of the facts prevails at trial, then each Defendant participated in the employment decisions by either choosing the politically-sponsored employee, by acquiescing in the choosing of the politically-sponsored employee, by selecting the politically-sponsored employee for final Commission approval or by creating the Personnel Documents to support the selection of

the politically-sponsored employee.

Finally, PTC Defendants' argument that the Personnel Documents dictated against promoting Christy anyway slights the fact that Christy has challenged the accuracy of the Personnel Documents. In fact, Christy alleges that they were purposely created to make it appear as if Pilecki and Dunn were more qualified. If there is an issue of material fact as to the knowing inaccuracy of the Personnel Documents, then there is a genuine issue of material fact as to the PTC Defendants' knowing reliance on them. Cf. Robertson, 62 F.3d at 601 (legitimate reason to discharge when employee threatened lives of co-workers by smoking in highly flammable work-place).

For these reasons, we find that there are genuine issues of material fact as to Christy's claims.

2. Qualified Immunity

Joint Defendants assert that they are entitled to qualified immunity from Christy's claims. To determine whether a public employee is entitled to qualified immunity, courts ask whether the right alleged to have been violated was clearly established at the time of the alleged violation. If it was, then courts determine whether the defendant could reasonably have believed that his or her discretionary actions comported with that right. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 726 (3d Cir. 1989) cert. denied, 493 U.S. 1044 (1990). Summary judgment in a defendant's favor is appropriate if there is evidence that a reasonable official could have believed that his or her actions were legal. Anderson v. Creighton, 483 U.S. 635, 641 (1987). Joint Defendants do not contest that Christy's First Amendment rights were clearly established at the time of the alleged violations. Our analysis, therefore, will focus on the second aspect of the above test.

Joint Defendants argue that summary judgment is appropriate because they followed the procedures established in Policy Letter 65. They argue that since they could reasonably have believed that Policy Letter 65's procedures defined the legal way to promote and because they did follow Policy Letter 65's procedure, they could reasonably ahve believed that they acted lawfully and are entitled to qualified immunity.

If Christy alleged procedural violations, this argument would succeed. Christy's lawsuit, however, alleges that although Joint Defendants may have comported with the administrative procedure in that they had the appropriate meetings and took the appropriate votes, in fact, these procedures were a smokescreen for the actual political patronage promotion process. For this reason, Joint Defendants' reliance on process does not answer whether they reasonably believed they acted legally.

Above, we concluded that the merits of Christy's claims were suitable for a trial. Here, we conclude that summary judgment is likewise inappropriate on the issue of qualified immunity. If Christy's allegations are true, then Joint Defendants knowingly used the procedures in Policy Letter 65 to effectuate political patronage, which was clearly proscribed at the time. Rutan, 497 U.S. 62. No public official could reasonably have believed that such knowing circumvention was legal, and for this reason, we deny summary judgment.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES CHRISTY	: CIVIL ACTION
VS.	: NO. 93-3346
PENNSYLVANIA TURNPIKE COMMISSION, ROBERT BRADY, JAMES L. DODARO, HOWARD YERUSALIM, FRANK A. URSOMARSO, JAMES F. MALONE, III, JOHN L. SOKOL, JR., S. MICHAEL PALERMO, JOSEPH L. DIRIENZO, SAMUEL S. CARNABUCI, MELVIN M. SHELTON, DEBORAH KOVAL, JOHN A. BOSCHI, VINCENT J. GRECO, JOHN A. STEWART, GEORGE PILECKI and SEAN PILECKI	:

ORDER

AND NOW, this day of November, 1995, upon consideration of:

Doc. #	Pleading
130	Motion by Defendants James L. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L. Dirienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Koval,

	George Pilecki and sean Pilecki for Summary Judgment
137	Initial Response by Plaintiff Charles Christy to Motion for Summary Judgment
141	Response by Defendants to Plaintiff's Rule 56(f) Motion to Dismiss Defendants' Motion for Summary Judgment
159	Renewed Motion by Defendant John A. Boschi for Summary Judgment
160	Motion by Defendant Frank A. Ursomarso for Summary Judgment
161	Motion by Defendant Robert Brady for Summary Judgment
162	Motion by Defendant James J. Dodaro for Summary Judgment
163	Motion by Defendant Howard Yerusalim for Summary Judgment
164	Motion by Defendant Pennsylvania Turnpike Commission for Summary Judgment
165	Motion by Defendant James F. Malone III for Summary Judgment
166	Supplemental Memorandum by Defendants Pennsylvania Turnpike Commission, Robert Brady, James L. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L.

Dirienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Koval, Vincent J. Greco, John A. Stewart, George Pilecki and Sean Pilecki in support of Motions for Summary Judgment

167 Motion by Defendant Vincent J. Greco for Summary Judgment

168 Motion by Defendant George Pilecki for Summary Judgment

169 Motion by Defendant Sean Pilecki for Summary Judgment

170 Motion by Defendant John A. Stewart for Summary Judgment

171 Motion by Defendant Melvin M. Shelton for Summary Judgment

172 Motion by Defendant John L. Sokol, Jr. for Summary Judgment

173 Motion by Defendant S. Michael Palermo for Summary Judgment

174 Motion by Defendant Joseph L. DiRienzo for Summary Judgment

175 Motion by Defendant Samuel S. Carnabuci for Summary Judgment

176 Motion by Defendant Deborah Koval for Summary Judgment

183-4 Response by Plaintiff Charles Christy in opposition to Defendants' frivolous motion for Summary Judgment

190 Reply by Defendant John A. Boschi to Plaintiff's Response to Defendants' renewed Motion for Summary Judgment

191 Reply Memorandum by Defendants Pennsylvania Turnpike Commission, Robert Brady, James L. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L. Dirienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Koval, Vincent J. Greco, John A. Stewart, George Pilecki and Sean Pilecki in support of motion for Summary Judgment,

AND, in accordance with the attached Memorandum of Law, the Motions for Summary Judgment are hereby DENIED.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1995

CHARLES CHRISTY

v.

PENNSYLVANIA TURNPIKE COMMISSION, A DULY ORGANIZED
AND EXISTING AGENCY OF THE COMMONWEALTH OF PENNSYLVANIA;
ROBERT BRADY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
JAMES J. DODARO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
HOWARD YERUSALIM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
FRANK A. URSOMARSO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
JAMES F. MALONE, III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
JOHN L. SOKOL, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
S. MICHAEL PALERMO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
JOSEPH L. DiRIENZO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
SAMUEL S. CARNABUCI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
MELVIN M. SHELTON, INDIVIDUALLY AND IN HIS

OFFICIAL CAPACITY;
DEBORAH KOVAL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY;
JOHN A. BOSCHI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
VINCENT J. GRECO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
JOHN A. STEWART, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
GEORGE PILECKI, INDIVIDUALLY; SEAN PILECKI, INDIVIDUALLY

James L. Dodaro, Howard Yerusalim, Frank A. Ursomarso, James F. Malone, III, John L. Sokol, Jr., S. Michael Palermo, Joseph L. DiRienzo, Samuel S. Carnabuci, Melvin M. Shelton, Deborah Koval, George Pilecki and Sean Pilecki,
Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Action No. 93-cv-03346
(Honorable J. Curtis Joyner)

Argued June 11, 1996

Before: SCIRICA and ROTH, Circuit Judges
and RESTANI, Judge, Court of International Trade*

ORDER OF DISMISSAL

The appeal from the district court's order denying summary judgment on the basis of qualified immunity is dismissed. "A defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." Johnson v. Jones, 115 S. Ct. 2151, 2159 (1995). An order denying summary judgment on the basis of factual issues is not a "final decision" under 28 U.S.C. § 1291 or the "collateral order" doctrine. Id. at 2156-57.

Costs taxed against appellants.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1995

CHARLES CHRISTY

v.

PENNSYLVANIA TURNPIKE COMMISSION, A DULY ORGANIZED
AND EXISTING AGENCY OF THE COMMONWEALTH OF PENNSYLVANIA;
ROBERT BRADY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
JAMES J. DODARO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
HOWARD YERUSALIM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
FRANK A. URSOMARSO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
JAMES F. MALONE, III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
JOHN L. SOKOL, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
S. MICHAEL PALERMO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
JOSEPH L. DiRENZO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
SAMUEL S. CARNABUCI, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
MELVIN M. SHELTON, INDIVIDUALLY AND IN HIS

OFFICIAL CAPACITY;
DEBORAH KOVAL, INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY;
JOHN A. BOSCHI, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY;
VINCENT J. GRECO, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY;
JOHN A. STEWART, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY;
GEORGE PILECKI, INDIVIDUALLY; SEAN PILECKI,
INDIVIDUALLY

James L. Dodaro, Howard Yerusalim,
Frank A. Ursomarso, James F. Malone, III, John L.
Sokol, Jr., S. Michael Palermo, Joseph L. DiRienzo,
Samuel S. Carnabuci, Melvin M. Shelton, Deborah
Koval, George Pilecki and Sean Pilecki,
Appellants

(D.C. Civ. No. 93-cv-03346)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH,
LEWIS, McKEE AND SAROKIN, Circuit Judges,
and RESTANI, Judge, Court of International Trade*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

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*The Honorable Jane A. Restani, Judge, United States Court of International Trade, who sat by designation, as to panel rehearing only.

(2)

Supreme Court, U.S.
F I L E D
OCT 15 1996
CLERK

No. 96-387

In The
Supreme Court of the United States

October Term, 1996

JAMES L. DODARO, HOWARD YERUSALIM, FRANK URSOMARSO, JAMES F. MALONE, III, JOHN L. SOKOL, JR., S. MICHAEL PALERMO, JOSEPH L. DIRIENZO, SAMUEL S. CARNABUCI, MELVIN M. SHELTON, DEBORAH KOVAL, GEORGE PILECKI AND SEAN PILECKI,

Petitioners,

vs.

CHARLES CHRISTY,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals For the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

John P. Hickey
Counsel of Record
Kleinbard, Bell & Brecker
1900 Market Street, Ste 700
Philadelphia, PA 19103
(215) 496-7219

William Goldstein
Groen, Laveson, Goldberg & Rubenstone
Four Greenwood Sq., Ste 200
Bensalem, PA 19020
(215)638-9330

Attorneys for Respondent

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APPENDIX A: Order Permitting Petitioners to File a Brief and Appendix on the Merits Prior to Deciding Christy's Motion to Dismiss, Entered December 29, 1995.

APPENDIX B: Order Referring Christy's Motion to Dismiss to the Merits Panel and Requiring Christy to File a Brief on the Merits Prior to Deciding Christy's Motion to Dismiss, Entered January 29, 1996.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Charles Christy ("Christy") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Order of Dismissal entered by the Court of Appeals for the Third Circuit. The decision of the Third Circuit in this case is not inconsistent with existing federal law, nor does it reflect a split of authority among the Circuits.[1]

UNCITED SIGNIFICANT OPINIONS BELOW

Petitioners have failed to disclose the existence of two significant unreported Orders entered by the Court of Appeals for the Third Circuit in this case. The first order entered on December 29, 1995 permitted the Petitioners to file their brief and appendix on the merits for consideration *prior* to a ruling on Christy's Motion to Dismiss and is reproduced *infra* at Appendix 1a. The second order entered on January 29, 1996 referred Christy's Motion to Dismiss to the merits panel and required Christy to file a brief on the merits for consideration *prior* to a ruling on Christy's Motion to Dismiss and is reproduced *infra* at Appendix 1b.[2]

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[1] The Opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 904 F. Supp. 427. The Order of Dismissal and the Order denying the petition for rehearing are unreported. Christy will refer to each of the foregoing decisions by reference to the Petitioners' Appendix (PA).

[2] The Third Circuit also issued an Order dated January 29, 1996 which granted Petitioners' request to file a supplemental brief and an Order dated March 18, 1996 which granted Christy's request to file a supplemental appendix. These Orders are unreported.

The Petitioner's also failed to cite an opinion entered by the District Court in this case on January 4, 1996 which denied Petitioners' request to certify issues (concerning whether the evidence was sufficient) for appeal and further explained the District Court's opinion denying each Petitioner's motion for summary judgment. This decision is reported at 912 F. Supp. 148[3].

JURISDICTION

Christy submits that under *Johnson v. Jones*, 115 S.Ct. 2151 (1995), this Court does not have jurisdiction to review the the order in question because the denial of qualified immunity to each of the Petitioners was based on a determination by the District Court that the pretrial record was sufficient to establish genuine issues of fact for trial.

COUNTER STATEMENT OF CASE

Procedural History

Christy commenced this action on June 22, 1993 by filing a complaint against the Pennsylvania Turnpike Commission (the "Commission"), Robert Brady, John Stewart, Vincent Greco and John Boschi, employees of the Commission (collectively, the "Original Defendants"), alleging, inter alia, that he was not promoted to the position of paint crew foreman by the defendants for partisan political reasons in violation of

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[3] The only reference to this decision in the petition for certiorari is found in footnote 2 on page 8. Petitioners fail to even provide a citation to this important decision which is discussed *infra*.

his First Amendment rights.[4] On October 27, 1993, after limited discovery, Christy sought leave to amend his complaint to add the Petitioners (each of whom was also directly and influentially involved in the deprivation of Christy's constitutional rights), assert additional claims based on his failure to receive a second promotion and to modify, sharpen and/or delete certain other claims. On November 12, 1993, the Original Defendants filed motions for summary judgment asserting Eleventh Amendment immunity on behalf of the Commission, qualified immunity on behalf of the individuals and lack of any genuine issue of material fact as to each Original Defendant.

Christy was granted leave to amend his complaint on February 3, 1994 and the District Court denied the Original Defendants' motions for summary judgment, in toto, on March 10, 1994. The Original Defendants appealed the District Court's denial of their motions for summary judgment to the Third Circuit on the grounds of Eleventh Amendment and qualified immunity. The Third Circuit initially found that the Commission was not entitled to Eleventh Amendment immunity and correctly dismissed the Original Defendants' appeal on qualified immunity grounds for lack of jurisdiction because the District Court ruled it could not find qualified immunity based on the facts at summary judgment. *Christy v. Pennsylvania Turnpike Commission*, 1995 WL 127077, *1 n.4 (3d Cir. March 27,1995), *on rehearing*, 54 F.3d 1140 (3d Cir.

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[4] The Original Defendants having previously lost *on the merits before both* the District Court and the Third Circuit on the issue of whether they were entitled to immunity are not parties to this appeal. *Christy v. Pennsylvania Turnpike Commission,* 845 F. Supp. 1107 (E.D.Pa. 1994), *aff'd.*, 54 F.3d 1140 (3d Cir. 1995), *cert. denied,* 116 S.Ct. 340 (1995).

1995).

On petition for rehearing, the original opinion was vacated and a new opinion issued by the Third Circuit without further argument or briefing which affirmed the District Court's denial of the Original Defendants' motions for summary judgment based on both Eleventh Amendment and qualified immunity grounds. In the revised opinion, the Third Circuit addressed the issue of whether it had jurisdiction to hear the Original Defendants qualified immunity appeal where the pretrial record contains genuine issues of material fact, as follows:

> The plaintiff contends that we lack jurisdiction to entertain this argument because the district court's decision was based on factual rather than legal grounds. We do not agree. We will not address this question at length, however, because it appears likely that the Supreme Court will soon resolve this question in *Johnson v. Jones*, No. 94-455, 1995 WL 243454 (Argued April 18, 1995).

Christy v. Pennsylvania Turnpike Commission, 54 F.3d 1140, 1143-44 n. 4 (3d Cir. 1995). A second petition for a rehearing was considered by the Chief Judge and thirteen Circuit Judges and ultimately denied apparently without any Circuit Judge voting in favor of a rehearing.

Several weeks after the Third Circuit entered its revised opinion, this Court rendered its unanimous decision in *Johnson*, holding that " . . . a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of

fact for trial." 115 S.Ct. at 2159. Had *Johnson* been decided prior to the Original Defendants' appeal, the Third Circuit would have dismissed their appeal for lack of jurisdiction rather than ruling against them on the merits. This Court refused to hear the Original Defendants' petition for certiorari seeking further review of their entitlement to qualified immunity. 116 S.Ct. 340 (1995).

Prior to the close of discovery, each Petitioner and each Original Defendant filed motions for summary judgment which the District Court declined to address until discovery had been completed. After reviewing 2,000 pages of evidence and over 300 pages of briefing, the District Court denied all motions for summary judgment, *in toto*.[5]

Petitioners did not contest the fact that Christy's First Amendment rights were clearly established and known to them. 904 F. Supp. at 434 (PA 14a). Instead, the Petitioners argued that they followed Commission promotional policy and in so doing could have reasonably believed that they had acted lawfully because those actions were not politically motivated. In denying qualified immunity to the Petitioners, the District Court correctly found that the voluminous record established

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[5] Petitioner Frank Ursomarso ("Ursomarso") filed a motion for reconsideration asserting that the "unique evidentiary record which exists as to Mr. Ursomarso" entitled him to judgment as a matter of law, which was ultimately granted by the District Court. *Christy v. Pennsylvania Turnpike Commission*, 912 F. Supp. 146, 147 (E.D.Pa. 1996). Indeed, Ursomarso was the only defendant who did not participate in any of the promotional decisions at issue in this case and had previously abstained from participating in personnel matters because he did not condone the Commission's personnel policy and procedures.

genuine issues of material fact as to the Petitioners' participation in and the underlying political motivation behind the decisions to deny Christy his promotions and concluded that:

> If Christy's allegations are true, then Joint Defendants knowingly used the procedures set forth in Policy Letter 65 to effectuate political patronage, which was clearly proscribed at the time. No public official could reasonably have believed that such knowing circumvention was legal, and for this reason we deny summary judgment.

904 F. Supp. at 434 (PA 15a).

Petitioner's assertion that the District Court relied on *allegations* rather than *facts of record* to deny qualified immunity is misleading. *See* Petition at 8. The District Court specifically addressed this issue in a subsequent opinion and made it clear that:

> Although we used the words "contention" and "allegation" instead of "evidence" and "averment" we believe it is clear from the context that it was, in fact, Christy's evidence that we examined and found sufficient to create genuine issues of material fact. Lest there be any doubt, however, we now clarify that this Court looked to Christy's specific evidence, not the allegations in his complaint or in his pleadings, and that any language to the contrary should be disregarded.

912 F. Supp. at 149 n. 2.

In an effort to circumvent this Court's decision in *Johnson* and to provide a basis for appellate jurisdiction where none existed, the Petitioner's filed a motion with the District Court seeking certification of various evidentiary issues for appeal to Third Circuit. On January 4, 1996, the District Court denied Petitioners' motion, *in toto*, finding that ". . . this case is squarely within the ambit of *Johnson*." 912 F. Supp. at 149. Petitioner's assertion that the District Court had not even cited *Johnson* is inaccurate. *See* Petition at 9.

After the Petitioners filed a notice of appeal, Christy filed a motion to dismiss for lack of jurisdiction based on this Court's decision in *Johnson*. On December 29, 1995, the Third Circuit entered an order permitting the Petitioners to file their brief and appendix on the merits for consideration *prior* to a ruling on Christy's motion to dismiss. *See* Appendix 1a-2a. The Third Circuit entered a second order on January 29, 1996 referring Christy's Motion to Dismiss to the merits panel and requiring Christy to file a brief on the merits for consideration *prior* to a ruling on Christy's Motion to Dismiss. *See* Appendix 1b.

The Petitioners failed to disclose the existence of these two significant orders in their petition for certiorari. Instead, the Petitioners argue that they did not receive any appellate review of District Court's decision denying qualified immunity. Petition at 10. However, prior to entering the Order of Dismissal, the Third Circuit reviewed extensive briefs on the merits submitted by the parties, heard oral argument on the merits and then decided based on its own independent review of the record that it lacked jurisdiction to hear this appeal. A petition for a rehearing was considered by the Chief Judge and thirteen Circuit Judges and ultimately denied apparently without any Circuit Judge voting in favor of a rehearing.

The Petitioners did in fact receive not one, but two appellate reviews of the extensive evidentiary record in this case.[6] A comparison of the decisions rendered by the Third Circuit in this case does not, as the Petitioners suggest, demonstrate that the Third Circuit has improperly narrowed the scope of appellate review after *Johnson*. Petition at 11-12 n. 3. Rather, the Third Circuit correctly applied this Court's decisions in *Johnson* and *Behrens v. Pelletier*, 116 S.Ct. 834 (1996) and found (after a thorough review of the pretrial record) that it was without jurisdiction to hear the Petitioner's qualified immunity appeal because the pretrial record set forth genuine issues of fact for trial. Further review of the District Court's denial of Petitioners' qualified immunity defense because of the existence of genuine issues of material fact for trial is unwarranted and precluded by this Court's decisions in *Johnson* and *Behrens*.

Factual Background

Turning a deaf ear and a blind eye to the extensive factual record developed by Christy and thoroughly reviewed by the District Court and the Third Circuit in this case, the Petitioners have filed this appeal in order to further delay a trial on the merits. In this appeal, the Petitioners may not challenge the sufficiency of the evidence but may only argue that all of the conduct which the District Court deemed to be adequately supported met the *Harlowe* standard of objective

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[6] The first pre *Johnson* review resulted in an affirmance of the District Court's determination that the Original Defendants were not entitled to qualified immunity. The second post *Johnson* review of an expanded factual record resulted in an Order dismissing the Petitioner's qualified immunity appeal but only after a thorough review of the entire record.

reasonableness. *Behrens*, 116 S.Ct. at 842. For this reason, the Petitioners' appeal must fail.

At issue in this case is the Petitioners' failure to promote Christy to the positions of Paint Crew Foreman and Regional Fleet Systems Manager. The Petitioners' have admitted that Christy was qualified for both positions and was among the top three candidates for the Paint Crew Foreman position. The Petitioners argue that they promoted Sean Pilecki and Frank Dunn instead of Christy because they were more qualified and not for partisan political reasons. The District Court, however, correctly determined that Christy had proferred sufficient evidence to the establish that the decisions not to promote him were in fact politically motivated.

Petitioners' assertion that the District Court did not cite any factual issues that would preclude a determination of qualified immunity is inaccurate and misleading. Petition at 10. Even a cursory review of the District Court's opinion reveals that there are a myriad of factual issues which support the District Court's decision to deny qualified immunity to the Petitioners.

For example, in denying qualified immunity to the Petitioners, the District Court found that there was sufficient evidence to establish that (i) Christy was more qualified than Sean Pilecki and Frank Dunn, the employees who received the promotions; 904 F. Supp. at 431 (PA 7a); (ii) Christy did not have and chose not to seek political sponsorship in order to obtain a promotion; *Id.* at 432-3 (PA 10a-13a); (iii) Christy needed the political support of either defendant Robert Brady (the Chairman of the Democratic Party in Philadelphia) or Senator Fumo or he would not be promoted; *Id.* at 433 (PA 12a); (iv) Sean Pilecki had political sponsorship from Robert

Brady; *Id.* at 433 (PA 12a); and (v) Frank Dunn had political sponsorship from Senator Mello; *Id.* at 433 (PA 12a).

In addition, the District Court found that there was sufficient evidence to establish that (i) the interview and evaluation process was a sham; *Id.* at 431-33 (PA 7a, 13a); (ii) the evaluations were purposely altered to make it appear as if Sean Pilecki and Frank Dunn were more qualified; *Id.* at 433-34 (PA 14a); (iii) the Petitioners' were aware that political patronage ensured promotions and participated in that program; *Id.* at 431 (PA 7a); and (iv) the Petitioners actively participated in a plan to support a candidate previously selected on the basis of political patronage; *Id.* at 433 (PA 13a).

Under *Johnson* and *Behrens*, the Petitioners are only permitted to argue on appeal that although they engaged in the conduct cited by the District Court, such conduct did in fact satisfy the *Harlowe* test of objective reasonableness. It is readily apparent, however, that such overtly unlawful conduct could never be considered to have been objectively reasonable. The District Court denied qualified immunity to the Petitioners because no reasonable official could have reasonably believed that compliance with the literal terms of the Commission's promotional policy would or could legitimize politically influenced promotional decisions. *Id.* At 434 (PA 15a).

There was more than sufficient evidence in the record to support the District Court's conclusions. Among the evidence cited by the District Court was affidavits and notes made by Christy during the promotional process; testimony provided by defendant John Boschi; an affidavit from Louis Sperduti (the former Paint Crew Foreman and supervisor to both Christy and Sean Pilecki); and testimony provided by Jim Sperduti (a mechanic at the Devault maintenance facility). *Id.*

at 431-34 (PA 7a-15a). However, the sufficiency of the underlying evidence which formed the basis for the District Court's opinion may not be challenged by the Petitioners in this appeal.

In cases where the District Court failed to identify all of the particular charged conduct that it deemed adequately supported, this Court has recognized that ". . . an appeals court may have to undertake a cumbersome review of the record to determine what facts the district court, in a light most favorable to the nonmoving party, likely assumed." *Behrens,* 116 S.Ct. at 842 (citing *Johnson*). The Third Circuit undertook this review even though the District Court identified the specific conduct that it deemed adequately supported.

In this regard, the District Court cited significant admissions made by Original Defendant John Boschi (Deputy Executive Director Maintenance Operations), who has already exhausted all of his pretrial appeal rights in this action and is awaiting trial. Mr. Boschi is a senior level Commission employee who oversees all maintenance operations, including the promotion of employees.[7] During a meeting between Christy and John Boschi on March 17, 1993 at 1:45 p.m. in the

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[7] Mr. Boschi developed and implemented the interview and evaluation procedures utilized to promote all maintenance employees, he selects the interviewers and prepares the evaluations for virtually all promotional decisions involving maintenance employees. The evaluations prepared by Mr. Boschi are submitted to the personnel committee who are required to recommend the "most qualified" applicant to the Commissioners who must either accept or reject the recommendation. Mr. Boschi was directly involved in the promotional decisions at issue in this case. *See, Christy*, 904 F. Supp. at 430-31 (PA 6a-7a).

Devault Maintenance Facility, Mr. Boschi admitted that: (i) promotions are made on the basis of political patronage; (ii) Sean Pilecki received the promotion because he was supported by Commissioner Brady; (iii) without political support Christy would never be promoted and (vi) Christy should align himself with Commissioner Robert Brady and Senator Fumo. 904 F. Supp. at 431 (PA 7a).[8] Mr. Boschi admits that he had the conversation but remembers its contents differently. *Id.* Mr. Boschi was in a unique position to control the promotional process and to ensure with the assistance of the Petitioners that the politically sponsored candidates would receive the promotions.

The District Court correctly found that Mr. Boschi's alleged admissions created at least a question of fact as to what type of promotional support Sean Pilecki and Frank Dunn had and whether Christy's lack of a political affiliation within the workplace prejudiced him. *Id.* At 433 (PA 12a-13a). These issues can only be resolved by a jury.

The only rebuttal offered by the Petitioners is that their is no evidence that they knew about the conversation or that they could be bound or influenced by it. Petition at 5. Whether the Petitioners knew about the conversation is irrelevant and has no bearing on this issues before this Court. Moreover, Boschi's admissions are binding on the Petitioners due to the agency relationship between Boschi and the Petitioners evidenced by Policy Letter 65 (which was expressly approved by all members of the personnel committee and the

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[8] Jim Sperduti, a Commission mechanic in the Devault maintenance facility, overheard the conversation between Christy and Mr. Boschi and supports Christy's recollection of the conversation. 904 F. Supp. at 431 (PA 8a).

Commissioners). Mr. Boschi had been given express written authority by both the personnel committee and the Commissioners with respect to decisions involving the promotion of maintenance employees.

The Petitioners' assertion that the record contained no facts whatsoever concerning Sean Pilecki's political affiliation is inaccurate. Sean Pilecki was politically aligned with Commissioner Brady, the Democratic Chairman of Philadelphia County, and political officials supported by him. 904 F. Supp. at 431 (PA 7a). Moreover, George Pilecki was a Township Supervisor and his wife was a Democratic County Chairwoman. George Pilecki admitted to Lou Sperduti that he was using his political connections to get his son a promotion. *Id.*

The District Court even acknowledged that the Commission's hiring policy (as opposed to its promotional policy) " . . . specifically allows for political influence." *Id.* at 432 n. 5 (PA 11a). Many of the Petitioners actually admitted that they divided up lower level jobs among the political parties. Dividing up jobs on the basis of political affiliation is a clear violation of this Court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). The fact that the Petitioners routinely hire on the basis of political affiliation in violation of *Rutan* raises additional doubts as to the manner in which employees like Sean Pilecki (who was initially hired based on his political affiliation) are eventually promoted instead of more qualified employees like Christy who have far more seniority and experience.

Christy also submitted a detailed report prepared by Dr. Hobson, a personnel expert, which found that the Petitioners actions were not "objectively reasonable". The

report also highlighted inadequate training, supervision and enforcement of Commission personnel policies along with numerous other deficiencies. Although the District Court did not specifically cite this report in its opinion, the Petitioners chose not to submit an expert report to rebut the findings of Christy's personnel expert.

The foregoing evidence when viewed in a light most favorable to Christy together with the reasonable inferences which maybe drawn therefrom leads only to the conclusion that there are material issues of fact concerning the true nature and extent of each Petitioners' involvement in the failure to promote Christy for partisan political reasons in violation of his First Amendment rights. Petitioners' assertion that their are no genuine issues of material fact in support of Christy's claims is false, misleading and a gross mischaracterization of the record in this case.

SUMMARY OF THE ARGUMENT

The Third Circuit correctly dismissed the Petitioners' appeal under *Johnson* because the District Court's denial of qualified immunity to each of the Petitioners was based upon a determination that the pretrial record was sufficient to establish genuine issues of fact for trial. Prior to dismissing the Petitioners' appeal, the Third Circuit undertook a cumbersome review of the record to determine whether there were genuine issues of fact for trial. A further appellate review of the record in this case is unwarranted and precluded by this Court's decisions in *Johnson* and *Behrens*. The Third Circuit's decision to dismiss the Petitioners' appeal is consistent with the prevailing law in other jurisdictions.

REASONS FOR DENYING THE WRIT

I. The District Court's Determination That the Pretrial Record Was Sufficient to Establish Genuine Issues of Material Fact May Not Be Appealed under *Johnson*.

Whether the Petitioners' are entitled to qualified immunity in this case involves nothing more than a determination of whether the evidence could support a finding that the Petitioners' violated Christy's constitutional rights when they failed to promote him for partisan political reasons. *See* Factual Background *Supra.* In the instant appeal as in *Johnson*, there are material facts in dispute as to what the Petitioners did or did not do which precluded the District Court from determining that they were entitled to qualified immunity. The admissions made by Mr. Boschi in this case are in and of themselves sufficient to create genuine issues of material fact as to whether the Petitioners violated Christy's constitutional rights.

In *Johnson*, three police officers who were sued for excessive force in making an arrest claimed that they had not beaten the plaintiff and were not present while others did so. The district court denied their motion for summary judgment based upon qualified immunity because of deposition testimony that the three officers were present at the time of plaintiff's arrest and were in or near the room where plaintiff claimed to have been beaten. The police officers appealed on the basis that the record did not support a finding that there was a genuine issue of material fact as to their participation.

In *Johnson*, this Court found that where the defense of qualified immunity is based upon a factual assertion of non-

participation, such claim is too deeply entwined with the underlying merits of the case to qualify for interlocutory appeal. *Johnson,* 115 S.Ct. at 2156. In *Behrens,* this Court explained its holding in *Johnson* as follows:

> *Every* denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that *every* denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they arise in a qualified immunity case; if what is at issue is nothing more than whether the evidence could support a finding that particular conduct occurred, the question is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell.*

Behrens, 116 S. Ct. at 842 (citing *Johnson*). Because the evidence cited by the District Court in this case could support a finding that the Petitioners violated Christy's constitutional rights when they failed to promote him for partisan political reasons, they are not entitled to an interlocutory appeal.

In this appeal, the Petitioners may not challenge the sufficiency of the evidence but may only argue that all of the conduct which the District Court deemed to be adequately supported met the *Harlowe* standard of objective reasonableness. *Behrens,* 116 S.Ct. at 842. Unlike *Behrens,* the District Court in the instant case did specifically identify the charged conduct that it deemed to be sufficiently supported. It is readily apparent that the conduct of the Petitioners cited by the District Court could never be considered to have been

objectively reasonable. In this regard, the District Court correctly found that:

> If Christy's allegations are true, then Joint Defendants knowingly used the procedures in Policy Letter 65 to effectuate political patronage, which was clearly proscribed at the time. *Rutan*, 497 U.S. 62, 110 S.Ct. 2729. No public official could have reasonably believed that such knowing circumvention was legal, and for this reason we deny summary judgment.

Christy, 904 F. Supp. 434.

Petitioners will have their opportunity at trial to persuade the jury that they did not participate in the denial of Christy's promotions for partisan political reasons in violation of Christy's constitutionally protected right to free speech and free association. However, having failed to persuade the District Court that there are no genuine issues of material fact as to their actual conduct, the Petitioners may not now pursue an interlocutory appeal and seek appellate review of the District Court's denial of their motion for summary judgment on the qualified immunity issue.

II. The Third Circuit Conducted a Review of the Record Prior to Dismissing the Petitioners' Appeal and Any Further Review of the Record is Precluded by *Johnson* and *Behrens.*

The Petitioners assert that "[r]ather than recognizing the significance of *Behrens*, the Third Circuit order in this case ignored it and continues to apply the *Johnson* exception broadly." Petition at 27. However, the Third Circuit did in fact correctly follow the guidelines established by this Court in both

Johnson and *Behrens* and had no alternative but to dismiss the Petitioners' appeal for lack of jurisdiction.

In *Johnson* and *Behrens*, this Court recognized that in cases where the District Court does not identify the particular conduct it deemed to be adequately supported, ". . . a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party likely assumed." *Behrens, 116 S.Ct. at 842.* The Petitioners conveniently overlook the fact that the Third Circuit did in fact undertake its own independent review of the record in this case prior to dismissing the Petitioners' appeal.

The Petitioners failed to disclose the existence of two Orders entered by the Third Circuit. The first order permitted the Petitioners to file their brief and appendix on the merits *prior* to ruling on Christy's motion to dismiss. *See* Appendix 1a -2a. The second Order referred Christy's motion to dismiss to the merits panel and required Christy to file a brief on the merits *prior* to ruling on Christy's motion to dismiss. *See* Appendix 1b. The Third Circuit could have dismissed the appeal without requiring the parties to submit briefs on the merits and without requiring an oral argument on the merits because the conduct of the Petitioners cited by the District Court could never be considered to have been objectively reasonable. However, the Third Circuit conducted its own independent review of the underlying facts and based on that review determined that it did not have jurisdiction.

The Petitioners have already had their appellate review and any further review is unwarranted and precluded by this Court's decisions in *Johnson* and *Behrens*. Petitioners suggest that the Third Circuit should have stated whether the factual

record would preclude a reasonable defendant in the position of each Petitioner from believing that he or she was complying with *Rutan*. Petition at 17. The answer to this question is obvious. Moreover, requiring the Third Circuit to provide its own detailed analysis of a record which contains genuine issues of material fact would render this Court's decisions in *Behrens* and *Johnson* meaningless.

III. The Third Circuit's Decision in This Case is Consistent With the Prevailing Law in Other Circuits.

The Petitioners assert that the Third Circuit's decision in this case is directly contrary to prevailing law in the Second, Fifth, Eight, Ninth and Eleventh Circuits. Petition at 18-27. In any of these circuits, the Petitioners assert that the *Johnson* decision would not have prevented the court from hearing their qualified immunity claim. Petition at 25.

None of these circuits would have accepted the Petitioners' appeal and many would likely have dismissed this appeal without conducting the independent review of the record performed by the Third Circuit. All of the other circuits have uniformly recognized, as they must, that the sufficiency of evidence may not be considered on appeal. Applying this basic rule to the instant appeal confirms that the Third Circuit's decision to dismiss the Petitioners' appeal for lack of jurisdiction was correct.

CONCLUSION

Evidently, the Petitioners (like the Original Defendants who lost their qualified immunity appeal on the merits before *Johnson* was decided) do not believe that it is possible for the

District Court, the panel or the Third Circuit en banc to have ruled against them had they really understood the law and the Petitioners' arguments. However, the Petitioners have identified no legal basis for their entitlement to repeated bites at the same apple. Quite simply, the Original Defendants were wrong when they first made these arguments, the Petitioners were wrong with they reasserted these arguments and they are still wrong. Accordingly, for all of the foregoing reasons, Petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

John P. Hickey
Counsel of Record
Kleinbard, Bell & Brecker
1900 Market Street, Ste 700
Philadelphia, PA 19103
(215) 496-7219

William Goldstein
Groen, Laveson, Goldberg & Rubenstone
Four Greenwood Sq., Ste 200
Bensalem, PA 19020
(215) 638-9330

Attorneys for Respondent

October 11, 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 20, 1995
C-54

No. 95-1995

CHARLES CHRISTY
v.
PENNSYLVANIA TURNPIKE, et al., Appellants
(EDPA D.C. No. 93-cv-3346 (JCJ))

Present: GREENBERG, COWEN and ALITO, Circuit Judges

1) Motion by appellants to expedite briefing and argument.

2) Letter treated as motion by appellants for extension of time to file brief and appendix until 01/05/96.

3) Motion of appellee for expedited summary dismissal of appellants' interlocutory appeal for lack of jurisdiction pursuant to internal operating procedure 10.6.

4) Response of all appellants in opposition to appellee's motion to dismiss appeal for lack of jurisdiction.

Lenore R. Benoit 597-5017
Deputy Clerk

Response due 12/28/95

ORDER

The appellants shall file and serve their brief and appendix on the merits of the case on or before January 5, 1996, which shall also include any response to the Motion to Dismiss beyond that in the response filed on December 26, 1995. The court will thereafter determine whether to require a brief from the appellee on the merits of the appeal depending upon whether the appeal is being dismissed.

By the Court,

_____

December 29, 1995

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1995

CHARLES CHRISTY

v.

PENNSYLVANIA TURNPIKE, et al.,

Appellants

PRESENT: GREENBERG, COWEN, and ALITO, Circuit Judges

ORDER

The motion to dismiss the appeal is referred to the merits panel. The appellee shall serve and file his brief on the merits within 30 days.

BY THE COURT:

_____
Circuit Judge

DATED: January 29, 1996

Supreme Court, U.S.
FILED
NOV 1 1996
CLERK

NO. 96-387

In The
Supreme Court of The United States
October Term 1996

JAMES L. DODARO, HOWARD YERUSALIM, FRANK A. URSOMARSO, JAMES F. MALONE, III, JOHN L. SOKOL, JR., S. MICHAEL PALERMO, JOSEPH L. DIRIENZO, SAMUEL S. CARNABUCI, MELVIN M. SHELTON, DEBORAH KOVAL, GEORGE PILECKI AND SEAN PILECKI,

Petitioners

vs.

CHARLES CHRISTY ,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Michael M. Baylson
Attorney of Record
Frank E. Noyes, II
DUANE, MORRIS & HECKSCHER
One Liberty Place
Philadelphia, PA 19103-7396
(215) 979-1150/1138

6 pp

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A recent development in the Third Circuit since the time this Petition was filed provides further support for the need for this Court to review and reverse the Third Circuit's dismissal of Petitioners' qualified immunity appeal. The Third Circuit has just issued a decision in a case very similar to this case that directly rejects its own refusal to accept appellate jurisdiction over Petitioners' appeals in this case.

In *Grant v. City of Pittsburgh*, 1996 U.S. App. LEXIS 27253 (3d Cir. Oct. 18, 1996), the Court considered the appeals of twelve individual defendants whose summary judgment motions for qualifying immunity had been denied by the district court below. Like this case, *Grant* involved a claim of alleged political discrimination, asserted against numerous individuals. Like this case, the district court in *Grant* had denied qualified immunity without considering the individual position of each appellant. *Unlike* this case, however, the Third Circuit in *Grant* accepted jurisdiction over the interlocutory appeal, and held that the district court had improperly failed to analyze separately the specific conduct of each individual defendant claiming qualified immunity. *Id.* at *2, *12.

The Third Circuit held that it had jurisdiction over the appeal under *Johnson v. Jones*, 115 S.Ct. 2151 (1995), because by failing to consider each individual defendant's qualified immunity claim separately, the district court did not apply the correct legal standard, and thus the appeal raised a question of law. *Grant*, slip op. at *7.[1]

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[1] The *Grant* decision is the first case other than the matter on petition in which the Third Circuit has cited *Johnson v. Jones*. It is also the first time that the Third Circuit has cited *Behrens v. Pelletier*, 116 S.Ct. 834 (1996), which it cited in concluding that defendants may appeal the denial of qualified immunity at the summary judgment stage even if they had not

(continued...)

The Third Circuit emphasized that the District Court's failure to look individually at each defendant's situation made it "virtually impossible" for the appellate court to review the qualified immunity claims. *Id.* at *12. In remanding the case, the Court emphasized the importance of individual review of qualified immunity claims:

> Taking heed of the narrower focus required by *Anderson* [*v. Creighton*, 483 U.S. 635 (1987)] (i.e., at the official's specific conduct, not just the right allegedly violated) is critical, for it can mean the difference between immunity from suit and being held personally liable for money damages.
>
> * * *
>
> Thus, crucial to the resolution of any assertion of qualified immunity is a careful examination of the record (preferably by the District Court) to establish, for purposes of summary judgment, a detailed factual description of the actions of each individual defendant
>
> . . .

Grant, slip op. at *13-14, *15. The Court specifically noted that for eight of the individual defendants "the summary judgment ruling fails to set forth with enough specificity the conduct of each defendant that the District Court thought sufficient to defeat qualified immunity" and with respect to the other four individual defendants, "the District Court announced no findings whatsoever." *Id.* at *17. The Circuit Court acknowledged this Court's admonition in *Johnson v. Jones* that the Circuit Court may need to "'undertake a cumbersome review of the record'" if the district court has not, *Id.* at *20 (quoting *Johnson*, 115 S.Ct. at 2159). In *Grant*, however, the appellants apparently agreed to a remand rather than having the Circuit Court perform the necessary review of the record. *Id.* at *20, n. 2.

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[1](...continued)
appealed from the denial of qualified immunity at the initial pleading stage.

The failure of the District Court to undertake separate consideration of each individual defendant's qualified immunity claims is precisely the same error that Petitioners in this case asserted to the Third Circuit. That failure was critical in this case, as the district court's own actions demonstrate. As noted in the Petition for Writ of Certiorari, one of the Petitioners, Frank Ursomarso, *individually* filed a Motion for Reconsideration with the District Court following the denial of summary judgment. When the District Court considered Mr. Ursomarso's qualified immunity claim *individually*, it reversed its prior ruling and entered summary judgment. Thus, there is no question that individual consideration of qualified immunity claims could be crucial for each of the petitioners in this matter, as the Third Circuit acknowledged in *Grant*.

Respondent Christy makes the same error in his Opposition to the Petition for Writ of Certiorari, asserting facts indiscriminately against the Petitioners as a group with no attempt to address the separate and distinct circumstances of each Petitioner's involvement in the promotion process at issue. Each of the Petitioners had different knowledge and different responsibilities that must be considered in determining whether he or she reasonably could have believed he or she was complying with clearly established law. Each Petitioner is entitled to have the Court consider his or her own individual circumstances and involvement, rather than having qualified immunity summarily rejected as a 'gang of twelve.'

The response of the Third Circuit to the qualified immunity claims in *Grant* directly contradicts the response in this case. In *Grant*, the Third Circuit accepted jurisdiction and remanded the matter for more complete review of the qualified immunity claims. In this case, however, the Court dismissed the Appeal under *Johnson v. Jones*, undertaking no individual review.

The Third Circuit's decision in *Grant v. City of Pittsburgh* is consistent with this Court's teaching on qualified immunity appellate jurisdiction. Application of the decision in *Grant v. City of*

Pittsburgh to this case would have resulted in the Third Circuit accepting jurisdiction and remanding the matter to the District Court for individual consideration of the qualified immunity claims. The treatment given to the petitioners herein is inconsistent not only with prevailing law in other circuits, but also with the more recent precedential determination from the Third Circuit. Indeed, under *Grant*, the dismissal of Petitioners' appeals would not be permitted. For these reasons as well as the reasons stated in the Petition for Writ of Certiorari, petitioners respectfully request that the Court grant a Writ of Certiorari in this case.[2]

Respectfully submitted,

Michael M. Baylson
Attorney of Record
Frank E. Noyes, II
DUANE, MORRIS & HECKSCHER
One Liberty Place
Philadelphia, PA 19103-7396
(215) 979-1150/1138

Attorneys for all Appellants

Of Counsel:

Kevin F. Longenbach, Esquire
Pennsylvania Turnpike Commission
P.O. Box 8531
Harrisburg, PA 17105
(717) 986-9617

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[2] As stated in footnote 12 of the Petition for Writ of Certiorari, petitioners specifically ask that this Court consider summary reversal and remand of the matter to the Third Circuit with instructions that it accept jurisdiction and consider petitioners' qualified immunity appeals on the merits. This request is all the more appropriate in light of the decision in *Grant v. City of Pittsburgh*.